

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

BRENDAN J. BERGER, . Case No. 1:19-cv-00099
Plaintiff, . Motion for Preliminary
vs. . Injunction
NATIONAL BOARD OF MEDICAL . Day 1
EXAMINERS, . Monday, July 29, 2019
Defendant. .

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE KAREN L. LITKOVITZ, MAGISTRATE JUDGE

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For the Defendant:

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Also Present: Brendan J. Berger
Law Clerk: Eden Thompson
Courtroom Deputy: Arthur Hill
Court Reporter: M. Sue Lopreato, RMR, CRR

P R O C E E D I N G S

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THE COURT: We are here in the case of Berger versus NBME, case number 1:19-99 on plaintiff's motion for a preliminary injunction.

Are plaintiffs ready to proceed?

MR. WEINER: Yes, Your Honor.

THE COURT: Would you like to introduce yourself and your client?

MR. WEINER: Yes, Your Honor. Charles Weiner representing the plaintiff, and I'm here with Brendan Berger.

THE COURT: Thank you. Defendants, are you ready to proceed?

MR. BURGOYNE: We are, Your Honor. Robert Burgoyne and Erin French on behalf of the National Board of Medical Examiners, and our client representative is flying in today. She will be here shortly.

THE COURT: Very well. Thank you.

MR. BURGOYNE: We also have in-house counsel from the National Board of Medical Examiners.

THE COURT: Great. Everyone ready to proceed?

MR. WEINER: Yes, Your Honor.

MR. BURGOYNE: Yes, Your Honor.

THE COURT: Are there any preliminary items we need

1 to take up before I hear opening statements?

2 MR. WEINER: No, Your Honor.

3 MR. BURGOYNE: No, Your Honor.

4 THE COURT: Okay. Mr. Weiner, you may proceed.

5 MR. WEINER: Thank you. Good morning, Your Honor.

6 May it please the Court. I'm Charles Weiner, and I represent
7 the plaintiff, Brendan Berger, in this matter which involves a
8 preliminary injunction.

9 Mr. Berger is a person with disabilities. He has a
10 learning disability. He also is affected by Attention Deficit
11 Hyperactivity Disorder. His learning disability impacts his
12 reading, writing. His Attention Deficit Hyperactivity
13 Disorder, ADHD, impacts his thinking, concentration.

14 What impacts him most is performing timed measures on
15 standardized tests. His reading is slow and plotted. His
16 thinking is slow and plotted. It affects his processing
17 speed, and he has been unable to complete timed tasks,
18 particularly on standardized tests, within the standardized
19 time.

20 He is seeking a preliminary injunction in order to give
21 him accommodations of extended time on a medical licensing
22 exam, which is the National Board of Medical Examiners
23 licensing exam called the United States Medical Licensing Exam
24 Step 2 Clinical Knowledge, or USMLE Step 2 CK. He's
25 requesting this accommodation of extended time because of his

1 slow implied reading because he has been unable to complete
2 the test.

3 He has attempted to request accommodations on three
4 separate occasions, and he has been denied by the NBME on
5 three separate occasions. He has taken the USMLE Step 2 on
6 two occasions, and he has failed both times because of his
7 impairment because he has been unable to complete the exam.

8 Medical students are required to take the United States
9 Medical Licensing Exam in order to gain licensing to be a
10 physician. They are also required to take the medical
11 licensing exam in most medical schools, including his medical
12 school, in order to be able to graduate.

13 There is a barrier here that's been established by the
14 NBME by not providing the accommodations, which prevents him
15 from pursuing his career, and which prevents him from
16 graduating from medical school. We're asking that this Court
17 enter an order requiring that the NBME cease its
18 discrimination and provide accommodations on the medical
19 licensing exam.

20 This is not a matter where we have a plaintiff or a
21 claimant who is seeking accommodations on the 23rd hour.
22 Mr. Berger's disability has been a long-standing disability.
23 It has been affected and documented since his early childhood.

24 When he was in kindergarten, in second grade, he was
25 evaluated by his school. They had concluded that he required

1 specialized instruction. He received specialized instruction.
2 He received extended tutoring. He was actually home schooled
3 for a couple years in order to address and try and remediate
4 his significant impairments. These impairments included both
5 problems with reading, included problems with writing, and it
6 included problems with attention.

7 As he proceeded into high school, these problems
8 continued. His school provided him with extra tutoring. They
9 provided him with accommodations, including extended time on
10 assignments and exams. They also included accommodations such
11 as providing him with audio books and other forms of
12 assistance in order to help him read books, since he had
13 difficulty reading himself, that he would be provided with a
14 reader. He also was provided with a reader at home.

15 You will see documentation which supports that he
16 received these type of accommodations throughout elementary
17 and high school.

18 As he proceeded into college, he then went to University
19 of Cincinnati. He provided his documentation to the
20 University of Cincinnati. He had also been evaluated again.
21 The University of Cincinnati, which is subject to the
22 Americans with Disabilities Act, as well as Section 504,
23 reviewed his documentation and had concluded, based on his
24 documentation, that he is a person with a disability and that
25 he is entitled to accommodations. And he received

1 accommodations of extended time. He actually received double
2 extended time during his college years at University of
3 Cincinnati. He also received audio books. He received a
4 quiet room. And you will hear testimony regarding that, and
5 you will see documentation supporting that he had this
6 documentation.

7 When he went into medical school at the American
8 University of the Caribbean, he also submitted documentation
9 supporting his request for accommodations. His medical school
10 also provided him with accommodations, including extended time
11 on exams. Many of those exams are computerized exams, similar
12 to the USMLE exam, and including some of the exams which he
13 took in the United States are exams that are prepared by the
14 NBME.

15 The only place where he had previously been denied
16 accommodation was on the MCAT. And he had taken the MCAT. He
17 utilized strategies. You will hear the strategies he
18 utilized. He did not obtain a great score. He obtained a
19 score that was satisfactory enough to get him into a Caribbean
20 medical school, but he had great difficulty in completing that
21 test despite significant study efforts.

22 In 2013, he applied to take his first licensing exam,
23 which is the United States Medical Licensing Exam Step 1. He
24 submitted extensive documentation. You will have the exhibits
25 there in front of you, hundreds of pages of documents,

1 including elementary school records standardized test scores
2 from his early elementary years showing below average
3 performance, evaluations, and two evaluations which were
4 performed by Dr. Beach, who will be testifying here in court.

5 Dr. Beach did extensive evaluations, took an extensive
6 history, reviewed the extensive amount of documentation, and
7 performed various assessments herself, which she herself
8 administered, and had the opportunity to observe the
9 condition, manner, duration with which Mr. Berger reads,
10 writes, and performs academic tasks.

11 And she had concluded that Mr. Berger is a person with a
12 disability; that he is a person who has a learning disability
13 in reading and writing, and that he has Attention Deficit
14 Hyperactivity Disorder. She further recommended
15 accommodations, including extended time on the United States
16 Medical Licensing Exam Step 1. The NBME denied his request
17 for accommodations.

18 Their denial was submitted to Dr. Lovett, who will
19 testify on behalf of the NBME. Dr. Lovett is a consultant
20 utilized by the NBME. They have utilized him for the past ten
21 years. He is utilized by many testing entities. He has a
22 pension for recommending accommodations that are denied.
23 That's who they sent this to.

24 Dr. Lovett and the NBME never evaluated Mr. Berger.
25 They've never seen him. They've never talked to him. They've

1 only reviewed his test scores, and they have essentially taken
2 the liberty of disregarding Dr. Beach's evaluation reports and
3 the extensive documentation.

4 He took the United States Medical Licensing Exam Step 1.
5 He put in a significant study effort. You will hear the
6 strategies he utilized. He passed by six points, and it's a
7 scaled score. He passed by the skin of his teeth. He had a
8 great amount of difficulty passing this particular exam.

9 As he proceeded through his medical program, he then had
10 to take the United States Medical Licensing Exam Step 2 CK,
11 which is what we're here about today.

12 In 2015, he submitted another request for accommodations.
13 He submitted additional documentation, including the extensive
14 documentation that was previously submitted.

15 The NBME reviewed this documentation. They did not
16 submit it to an outside consultant. Their own inside
17 consultant reviewed the documentation, took over 100 days to
18 make a decision, and denied his request. They used dilatory
19 tactics. Throughout this process you will hear about the
20 dilatory tactics that the NBME utilizes.

21 Mr. Berger took the USMLE Step 2 CK. You will hear about
22 the strategies. You will hear about the extended study effort
23 he put in. He failed the exam. He failed by a lot. And he
24 failed because he was unable to complete the exam. In fact,
25 he was only able to complete about 60 percent of the exam when

1 he took it, because of his reading impairments.

2 In 2018, he attempted to take the exam again. He once
3 again applied for accommodations for the Step 2 CK exam. He
4 submitted additional documentation. This included additional
5 evaluation that was conducted by Dr. Beach. So this is the
6 third evaluation that Dr. Beach had performed.

7 She performed all the assessments herself. She had an
8 opportunity to observe the condition and manner in which
9 Mr. Berger reads, writes, and performs academic tests. She
10 had concluded once again that Mr. Berger is a person with a
11 disability, and she had concluded that he is entitled to
12 accommodations.

13 Because he had performed so poorly, and because he was
14 unable to complete the Step 2 CK within the standard amount of
15 time and only got through about 60 percent of the exam, she
16 this time had recommended a hundred percent extended time,
17 rather than the previously requested 50 percent extended time.

18 Mr. Berger submitted his request. The request was once
19 again reviewed by the NBME. They once again submitted it to
20 Dr. Lovett. Rather than sending it to someone new, who might
21 gave him a fair shake, they sent it to Dr. Lovett. Dr. Lovett
22 once again recommended a denial. NBME once again utilized
23 dilatory tactics and didn't respond to his request for 80
24 days. They told him he was denied.

25 He once again put forth a very significant study effort

1 to study for this exam. He utilized various strategies. You
2 will hear the strategies he utilized this time, which was at
3 the outset of each block of the exam, he put in all C's in
4 order to be able to answer as many questions as he could, and
5 he wouldn't have to take time at the end of each block to make
6 guesses or write in letters.

7 He took the exam. He failed the exam. He only got
8 through 60 percent of the exam. He failed by a lot,
9 unfortunately.

10 After the exam, the USMLE program contacted him and said
11 we see some irregular behavior here. You guessed so many C's.
12 We think that you weren't ready for the exam or didn't take
13 the exam in earnest. And he now had a block on his ability to
14 take the exam. They had the information in front of them that
15 he was unable to complete the exam.

16 He responded to the USMLE and they lifted the block. And
17 when he responded, he advised them of his learning disability,
18 of his test taking strategies and his inability to take the
19 exam.

20 He is ready to take this exam. He has the knowledge and
21 ability to take this exam. He has taken medical school exams,
22 and he has taken other NBME prepared exams, and he has
23 demonstrated proficiency to practice medicine. This is a
24 barrier in his moving forward in his degree and moving forward
25 in his career.

1 We are requesting the injunction at this point because
2 the residency match is coming up. He needs to take the exam
3 so that the exam is scored in the beginning of October. That
4 is when the interviews begin for the match program for
5 residency. This is why we are requesting the injunction be
6 entered now.

7 If he can't take the exam now, he will be unable to
8 pursue a match in the program. If he is unable to take the
9 USMLE without accommodations, he will likely fail again, as he
10 has failed two times. If he doesn't take the exam with
11 accommodations of extended time, he will be removed from
12 medical school because he has gone beyond the seven years that
13 his medical school requires one to complete a degree.

14 If he does not receive extended time on the USMLE, he
15 will not be able to pursue his lifelong dream of becoming a
16 doctor.

17 We request that this court enter an injunction providing
18 that Mr. Berger be given an opportunity to pass this exam, be
19 given an opportunity to take the exam with extended time and
20 pursue his career and finish his degree.

21 Thank you, Your Honor.

22 THE COURT: Thank you.

23 MR. BURGOYNE: Good morning, Your Honor.

24 THE COURT: Good morning.

25 MR. BURGOYNE: Your Honor, the United States Medical

1 Licensing Exam, as you know from the papers, is relied upon by
2 jurisdictions across the country as an important indication of
3 an individual's ability to deliver safe and effective
4 healthcare, therefore, the manner in which the exam is
5 administered is important not only for people who rely upon
6 the score, but for all examinees who are taking the exam.

7 As a consequence, NBME, when it reviews accommodation
8 requests, is fair but consciousness in its review of the
9 accommodation requests, and its goal in all instances is to
10 make sure that individuals with bonafide disabilities are
11 provided with testing accommodations, and that those who do
12 not document an impairment within the meaning of the Americans
13 with Disabilities Act do not obtain accommodations.

14 They do not engage in dilatory tactics in their review of
15 accommodation requests. In fact, not surprisingly, the number
16 of requests that they receive has steadily increased over the
17 years, and they receive hundreds of requests every year, which
18 they attempt to process in an orderly fashion within their
19 capabilities as an organization in staffing.

20 We're before you today on a motion for a preliminary
21 injunction, and as Your Honor well knows, a preliminary
22 injunction is an extraordinary and drastic remedy, to be
23 awarded only if there is a showing that the plaintiff is
24 likely to succeed on the evidence, I think prevailing on the
25 merits, and is likely to suffer irreparable harm. Irreparable

1 harm has to be immediate, not remote, and it has to be
2 certain, not speculative.

3 In this case, Your Honor, plaintiff is not going to be
4 able to and has not met those showings. In order to prevail
5 on the merits, he has to establish that he has a disability
6 within the meaning of the Americans with Disabilities Act. To
7 be disabled under the Americans with Disabilities Act, he has
8 to have a substantial limitation in a major life activity as
9 compared to most people in the general population.

10 In this case, the evidence is going to show that his own
11 assessments performed over the years show average to superior
12 performance in his reading and cognitive skills. The evidence
13 will show that he's taken many standardized tests without
14 accommodations and done very well; in fact, well above the
15 50th percentile, which is in excess of average.

16 He took the medical college admission test twice, and his
17 best score on that exam came on the verbal reasoning section,
18 which has lengthy vignettes, longer than anything he will
19 encounter on the Step 1 exam, and scored on that exam, I think
20 it was the 70th -- in the roughly 70th percentile range, which
21 meant he was in the top 30 percent, at least, of everybody who
22 took that exam. People who take the MCAT aren't the general
23 population. That's a very talented population that takes the
24 medical school exam.

25 He also took the PSAT when he was a junior in high school

1 and scored in the 77th percentile. He took that test without
2 accommodations and scored in the 71st percentile in his verbal
3 section. That's a measure of the skills that he is saying he
4 is substantially limited in.

5 He also took the Step 1 exam, as Mr. Weiner mentioned,
6 passed that on his first attempt. Step 1 exam is a difficult
7 exam. When he took that exam, after the exam, he contacted
8 Dr. Beach and said I felt good about my time management. So
9 certainly after the exam, there was no suggestion that he had
10 guessed throughout the exam, or only put a particular answer
11 for certain answers. He seemed to have felt good immediately
12 after the exam; and, in fact, he passed.

13 He also took the Step 2 clinical skills exam, which is
14 not a multiple choice test. They use so-called standardized
15 patients, where you interact with individuals who have a
16 described medical condition. He failed that exam the first
17 time, and his deficiencies were in the area of
18 intercommunication skills, and then he passed it the second
19 time. Neither of those times did he have accommodations.

20 Dr. Beach's opinions in this case are certainly entitled
21 to substantial weight, considerable weight, but they are not
22 entitled to a presumption of correctness. And the NBME, like
23 any other testing organization, was not required to defer to
24 the opinions reached by Dr. Beach.

25 He went to Dr. Beach in 2010 specifically to get

1 documentation to cause AAMC to change its mind, so he didn't
2 go to her for a neutral evaluation. She wasn't somebody that
3 he had been seeing his whole life. He went to her
4 specifically because she has experience in providing
5 documentation to testing organizations in support of
6 accommodation requests.

7 The evidence will show that there are many issues with
8 characterizations in her reports and elsewhere regarding
9 Mr. Berger's history of accommodations. There will be
10 instances, for example, where there is a suggestion that he
11 was accommodated in high school from the point of
12 matriculation forward.

13 In fact, the evidence will show that that wasn't the
14 case; that it was not until his junior year in high school,
15 according to a letter from Archbishop Moeller, in which he
16 received an evaluation report from a Dr. Smith in January
17 2003, and it was after that point that he was approved for
18 accommodations, so basically the second half of his junior
19 year in high school.

20 On the issue of irreparable harm, Your Honor, that's
21 tied, as I understand, to two things. One is the proposition
22 that he's about to be kicked out of his medical school.
23 Frankly, the status of his situation at medical school is
24 unclear to me. There's a letter in the record reflecting an
25 agreement between Mr. Berger's lawyer and the medical school's

1 lawyer saying, you know, if you've got a lawsuit pending
2 against him, he'll remain in good standing, in effect, and at
3 the end of that exercise, he'll be allowed to take the
4 Step 2 CK one more time.

5 We haven't seen direct communication between the medical
6 school and Mr. Berger, so we don't know what communications
7 have occurred since then, but at least as of December 2018,
8 there was nothing suggesting that he was about to be kicked
9 out of school if he didn't take the Step 2 CK exam in August
10 of 2019, or on any particular date.

11 The other alleged harm relates to his desire to
12 participate in the 2020 match. I don't know if Your Honor's
13 familiar with that, but that's the process by which medical
14 students get placed in residency programs. The 2020 match
15 begins, as he suggests, in the fall of 2019, but the match
16 itself doesn't take place until the spring of 2020.

17 His medical school advises students that they need to
18 make sure they take the Step 2 CK exam by December 31, 2019,
19 to ensure that they can participate in the 2020 match. So
20 even if participating in the match this year was, in fact, the
21 type of harm that was irreparable, an inability to participate
22 in the match, he doesn't have to take the exam in August in
23 order to participate in the main residency match, he could
24 take it later.

25 So we're in a situation here of sort of an expedited

1 preliminary injunction filed many months after the lawsuit was
2 filed, and without discovery having taken place, for a need
3 to, as I take it, he wants to begin interviews soon, and he
4 thinks he will be better positioned to get interviews with
5 schools if he has passed Step 2 CK at the time.

6 But all of that, all of the discussion about the
7 residency is based entirely on the suggestion of Mr. Berger
8 regarding how that process works and when he needs to start,
9 is not supported with evidence in the record regarding how the
10 whole match system works, nor is it supported with any
11 evidence or discussion of other options he has for obtaining a
12 residency position; and, in fact, there are other options for
13 obtaining a residency position.

14 If he participants in the main match and doesn't get a
15 residency position, he has the opportunity then, in March, to
16 participate in the so-called scramble, and that doesn't
17 require interviews. He and anybody who doesn't match can
18 engage in discussions or express interest to a residency
19 program, and they might get a position that way.

20 Individuals can also apply for residency positions
21 outside of the match. There are some programs which offer
22 residency positions to people without going through the main
23 match. And then there's also something called Find A Resident
24 program, which allows individuals throughout the year to
25 evaluate the possibility of residency positions.

1 So again, that's more information that has come in --
2 that hasn't come in through his papers, but the record exists.
3 We've put information in the record showing that there are
4 many options for him, and that his need to participate and get
5 a position in a residency program isn't, in fact, hinged on
6 taking the exam in August in order to participate in the main
7 match.

8 Finally, Your Honor, we think it's at least relevant in
9 this case that there has been a delay in seeking the
10 preliminary injunction. He learned five months before he
11 filed the lawsuit that he had failed the Step 2 exam on his
12 last administration. His score went up the second time, but
13 not enough to pass. He then waited five months to -- four to
14 five months to file suit, and then he waited another five
15 months to seek a preliminary injunction. And while we don't
16 think an injunction should be denied solely on that basis,
17 Your Honor, we certainly think it's a relevant consideration.

18 For all of these reasons, we respectfully request that
19 the Court deny the preliminary injunction.

20 THE COURT: Thank you.

21 MR. BURGOYNE: Thank you, Your Honor.

22 THE COURT: Mr. Weiner, you may proceed.

23 MR. WEINER: Your Honor, I'm going to go a little bit
24 out of order. I normally would have started with the
25 plaintiff, Mr. Berger; however, Maureen Holland, who is his

1 mother, is here, and she has to catch an early flight this
2 afternoon. I have very short testimony with her to address a
3 small point, and I'm going to start with Maureen Holland.

4 THE COURT: Very well.

5 MAUREEN HOLLAND

6 a witness herein, being first duly sworn, was examined and
7 testified as follows:

8 DIRECT EXAMINATION

9 BY MR. WEINER:

10 Q. Good morning. Can you state your name, please?

11 A. Maureen Holland.

12 Q. Where do you live?

13 A. I live in Rhode Island.

14 Q. What is your relationship with Brendan Berger?

15 A. I'm his mother.

16 Q. What is Brendan's native language?

17 A. English.

18 Q. Was he born in the United States?

19 A. He was born in New Haven, Connecticut.

20 Q. During his preschool and early elementary education, in
21 what country did he live?

22 A. America.

23 Q. In what country were you born?

24 A. America. Cincinnati.

25 Q. Is English your native language?

1 A. Yes.

2 Q. What is your educational background and training?

3 A. Up to the point -- you mean all the way through, or just
4 the beginning? I mean, I have a --

5 Q. Your latest, yes.

6 A. So my undergraduate degree is a BA in English Literature.

7 Q. And did you work at all after you had graduated college?

8 A. Yes. My first job after college was working at a
9 publishing company, and we took care of -- we did monographs
10 of great American literature and children's literature.

11 And then after I was married, I moved to France and I
12 taught two years, and what I taught was English as a foreign
13 language.

14 Q. So you lived in France for a period of time?

15 A. Yes.

16 Q. Did Brendan live in France?

17 A. No.

18 Q. What did you do in France?

19 A. What did I do?

20 Q. Yes. In terms of employment.

21 A. I taught.

22 Q. Was your husband at the time, is he a French native
23 speaker?

24 A. My ex-husband is a French native, yes.

25 Q. When Brendan was born, did he speak English?

1 A. My --

2 Q. I'm sorry. Your ex-husband, did he speak English at the
3 time?

4 A. Yes. When Brendan was born, he was actually doing a
5 residency at Yale University.

6 Q. And who was the primary caregiver for Brendan during that
7 period of time?

8 A. I was.

9 Q. And what language did you speak to Brendan in the home?

10 A. English.

11 Q. And did Brendan go to any preschools?

12 A. He did. He went to preschools, I believe, beginning when
13 he was three, so three, four, and five. And then he entered
14 kindergarten when he was six, so a little bit late, but --

15 Q. And his preschool years, did they speak English in the
16 preschool?

17 A. Yes.

18 Q. Did they speak English in his elementary school?

19 A. Yes.

20 Q. Was he ever taught French?

21 A. No.

22 Q. During his preschool years and early elementary school,
23 was French spoken at home?

24 A. No, it was not, with some exceptions.

25 Q. And what would those exceptions be?

1 A. So my ex-husband, being a Frenchman, all his family was
2 still living in France, so obviously sometimes we would have
3 phone calls, you know, birthdays, holidays, whatever; and, you
4 know, we would be, you know, speaking French to them on the
5 phone.

6 I think another occasion where we would speak French, and
7 this isn't very nice, but for example, if we were at a
8 restaurant. Let's say the family was at a restaurant, and my
9 husband and I didn't want people around us to know what we
10 were talking about, like the waiter, we would say something
11 quick in French.

12 Q. When Brendan was -- you had mentioned you also went to
13 France when Brendan was younger?

14 A. Yes.

15 Q. When you went to France, was French spoken to him then?

16 A. So the deal with Brendan was that he didn't understand
17 French. So I, for example, would speak French to my French
18 relatives, but I would speak English to Brendan because he
19 didn't understand French. And as a matter of fact, his French
20 relatives, for example, his French grandparents, spoke very
21 little English, but they had to speak English to Brendan
22 because he did not understand French.

23 Q. When Brendan was in his early elementary school and
24 preschool years, did he understand some French?

25 A. You know, probably words here and there.

1 Q. Was he taught French at all in early elementary school?

2 A. Absolutely not.

3 Q. If you're able to quantify in terms of a percentage, how
4 much English was spoken to Brendan during his preschool and
5 early education?

6 A. I mean, I don't think any French was spoken to him
7 because he didn't understand.

8 Q. In terms of speaking around Brendan during his early
9 education and preschool years, can you put a percentage on how
10 much English was being spoken?

11 A. You know, I mean, what, 90, 99 percent.

12 Q. Brendan had an evaluation by a Dr. Artner in 1994. Were
13 you present during that evaluation?

14 A. Yes.

15 Q. Were you the one who took Brendan to that evaluation?

16 A. Yes.

17 THE COURT: How do you spell Artner?

18 MR. WEINER: Dr. Artner, A-r-t-n-e-r.

19 THE COURT: Thank you.

20 Q. What was the purpose of that evaluation?

21 A. When Brendan was in first grade, he just didn't seem to
22 be able to do the reading and writing in school. And I was
23 pretty involved. I was a parent volunteer, so I would go and
24 read stories to the kids on occasion and help the teacher
25 like, you know, do cutouts, whatever. So I was kind of there,

1 you know, on an occasional basis, so I could kind of see what
2 was going on in the classroom. And I also knew how bright he
3 was, you know, and it didn't make sense to me.

4 He's my third child, and I had already been through this
5 whole reading process with my two daughters; and, you know, I
6 was just surprised. So we actually hired a reading tutor that
7 would come to the house in the afternoons after school and
8 work with Brendan, for about half a year, and that didn't seem
9 to do much either. So I was kind of at my wit's end because I
10 thought, you know, if we continue on this path, this child is
11 not going to be able to read.

12 So I did several things. I went to Springer school,
13 because we were thinking, well, maybe he should go to
14 Springer, which is, for people that don't know, that's a
15 specialized school for kids with learning disabilities. And
16 my husband and I thought that they could definitely support
17 his learning -- I should say his reading issues.

18 But Brendan was a child that was, I'm going to say twice
19 exceptional. Yes, he had this learning disability something,
20 I didn't really know what it was at that point, but I also
21 knew how bright he was, because I talked to him, and he was
22 very curious. But anyway, Dr. Artner, I wanted to get an
23 expert to tell me what was going on. That's why I went to
24 her.

25 Q. And you were looking for some type of direction in terms

1 of how to educate?

2 A. Correct. I mean, I was looking for analysis of what the
3 heck was going on here, okay. And I mean, the other thing is,
4 he was a premie, so I thought maybe something was connected to
5 that. But secondly, I wanted direction on, you know, what I
6 really needed to do to help him, because I was thinking of
7 home schooling him. That was the deal. I thought, you know,
8 if I can't find anything else that makes sense, I'm going to
9 just to do it myself.

10 Q. Did you provide a history to Dr. Artner?

11 A. I'm sure I did.

12 Q. Do you recall her asking whether or not English is spoken
13 in the home, or whether or not French is spoken in the home?

14 A. You know, I really don't recall, to be honest.

15 Q. Do you recall, if she asked that question, what your
16 answer was?

17 A. I don't recall. I mean, I've seen the documentation, but
18 I don't recall.

19 Q. Is there any reason why you would have told Dr. Artner
20 anything different than what you've just testified to?

21 A. I can't imagine that I would have, because what I've told
22 you is the truth.

23 Q. Did Dr. Artner ever indicate to you about not speaking
24 French in the home?

25 A. I don't remember talking about that.

1 MR. WEINER: That's all the questions I have.

2 THE COURT: Okay. Hang on one second.

3 THE WITNESS: Oh, I'm sorry.

4 THE COURT: That's okay. Mr. Burgoyne gets a chance
5 to ask you questions now. Mr. Burgoyne?

6 MR. BURGOYNE: Thank you, Your Honor.

7 CROSS-EXAMINATION

8 BY MR. BURGOYNE:

9 Q. Good morning, Mrs. Holland.

10 A. Good morning.

11 Q. And thank you for coming. I know nobody likes to travel.
12 Just a few quick questions. Are you fluent in French?

13 A. I am.

14 Q. And I believe you testified that French was rarely spoken
15 in the home?

16 A. Yes.

17 Q. And then you testified that you also went with Brendan to
18 see Dr. Artner?

19 A. Correct.

20 MR. BURGOYNE: Your Honor, I'd like her to have the
21 document I'm asking her about so she's not at a disadvantage.
22 Can I get her the exhibit?

23 MR. WEINER: It's also Exhibit 17 that's up there.

24 Q. Oh, you have the exhibits. Fantastic. There should be a
25 book in which there's an Exhibit 17, which is Dr. Artner's

1 report.

2 A. Okay. I'm probably going to need my glasses, actually.

3 Q. Can I hand you your purse?

4 A. Sure.

5 Q. Exhibit 17, do you recognize this as Dr. Artner's report?

6 A. Yes.

7 Q. And then on page 3, if you'll look at the page number at
8 the bottom?

9 A. Okay.

10 Q. Dr. Artner said, "It should be mentioned that French is
11 often spoken in the home"?

12 A. I see that.

13 Q. All right. And that was information, I assume, she got
14 from you at the time?

15 A. I mean, I don't know what to say about that because I
16 can't imagine that I would have said that because it would
17 have been untrue.

18 Q. You mentioned that you decided eventually to home school
19 Brendan because of the issues he was experiencing?

20 A. Correct.

21 Q. Did you also home school your two daughters?

22 A. I did.

23 Q. And for how long did you home school them?

24 A. Three and a half years.

25 Q. Is that roughly the same amount of period you home

1 schooled Brendan?

2 A. Yes.

3 Q. And neither of your daughters have any learning
4 disabilities issues?

5 A. Correct.

6 MR. BURGOYNE: Nothing further, Your Honor.

7 THE COURT: Any redirect?

8 MR. WEINER: No, Your Honor.

9 THE COURT: All right. Thank you. You may step
10 down.

11 THE WITNESS: Thank you.

12 (Witness excused.)

13 MR. WEINER: I would like to call Brendan Berger as a
14 witness.

15 BRENDAN J. BERGER

16 the plaintiff herein, being first duly sworn, was examined and
17 testified as follows:

18 DIRECT EXAMINATION

19 BY MR. WEINER:

20 Q. Good morning. Can you state your name, please?

21 A. Brendan Berger.

22 Q. Where do you live, Mr. Berger?

23 A. Here in Ohio, in Glendale, Ohio.

24 Q. Have you lived in Ohio most of your life?

25 A. Yes.

1 Q. How old are you?

2 A. I'm thirty-three.

3 Q. Can you talk about your educational experience and your
4 current status in terms of your education?

5 A. Yes. So I went to public school in Glendale, at Glendale
6 school, and I was home schooled from second through fourth
7 grade by my mother. And then I went to a private school fifth
8 through eighth grade in Glendale, and then I went to private
9 high school in Cincinnati here called Moeller.

10 And then after that was finished, I went to the
11 University of Cincinnati to do an undergraduate degree. And I
12 did some postbac classes at University of Cincinnati after I
13 got my undergraduate degree, and then I went to medical school
14 in St. Maarten at the American University of the Caribbean.

15 I'm currently a student at the American University of the
16 Caribbean, and I've completed all my course work except the
17 Step 2 CK exam, which is still outstanding to have a passing
18 score on that.

19 Q. Is there anything further you need to do in medical
20 school in terms of graduating?

21 A. No, that's it.

22 Q. The last requirement for you is to pass the Step 2 CK?

23 A. Yes, that's correct.

24 Q. And after that, you will receive your MD?

25 A. Correct.

1 Q. When did you first want to become a physician?

2 A. So my father is a physician, and so I thought about it
3 for many years, but I think that the decision for me really
4 came during my undergraduate years. That's when I realized
5 that the material that I had encountered in my course work
6 that related to medicine was something that I really felt I
7 had a talent at, and I was very skillful with that material,
8 and that I had the skill sets that would make me a good
9 physician, so probably in 2007, I'm guessing, maybe.

10 Q. All right. Is there a particular specialty that you wish
11 to pursue?

12 A. Yes. I'm interested in psychiatry.

13 Q. Why is that?

14 A. So there's a family history of relatives with mental
15 illness, and through exposure to that, I've always kind of
16 kept an eye on psychiatry. And during my rotations, I felt
17 that it was an area where I was able to excel. And as
18 somebody with a learning disability, the fact that I'm able to
19 interview patients, and a lot of what is required is actually
20 interviewing them, that interfaces very well with my strengths
21 instead of my weaknesses of, you know, reading and reviewing
22 tons of documentation, because I'm able to actually speak to
23 them and develop rapport with the patients, and I think
24 psychiatry is a very good fit for that reason.

25 Q. We're here in court regarding a preliminary injunction.

1 Why are you pursuing this preliminary injunction?

2 A. It's a long story, but basically, I've had accommodation
3 in school since early childhood. I have needed that to
4 complete all of my testing and proceed through my academic
5 career. And I've made it all the way to the point where now
6 I've completed the work for medical school after extreme,
7 many, many years of work and a lot of dedication, but when I
8 have applied for accommodation with the NBME, and I provided
9 all of the documentation that I could possibly have provided,
10 they'll come back with denials stating that they don't believe
11 that I fulfill the criteria for that.

12 And I'm in a position now where I finished all of my
13 course work in 2016, and the only thing remaining that entire
14 time, from 2016 until now, has been passing the Step 2 CK
15 exam.

16 I've tried to take it with accommodation -- without. I
17 tried to request accommodation on it, but since it wasn't
18 granted, I had to take the exam without accommodation. And
19 when I took the exam without accommodation, I was not able to
20 read and understand what they were asking because of the time
21 constraints, and I haven't been able to show my level of
22 mastery on this material, and instead I'm showing the fact
23 that my disability is showing.

24 And it's something that it is preventing me from moving
25 forward with my career, and it's preventing me from, you know,

1 from completing medical school and actually moving on towards
2 the role of physician, which is what my career path is.

3 And you know, I'm also extremely stressed from all of
4 this, because I had to take out student loans to complete
5 medical school. And I know that that's not the main purpose
6 of this, but it is something that does affect me greatly
7 because I have the stress of constantly preparing for this
8 exam because at any moment the NBME could decide that I have
9 to take the exam. And I can't work while I'm busy studying
10 for the exam.

11 So I'm in a position here where I'm in this holding
12 pattern. I've been in this holding pattern for a long time,
13 and until that changes, I won't be able to move forward with
14 my career path, and I can't -- you know, sorry. I kind of got
15 a little lost there. I'm sorry.

16 Q. You had mentioned that you're a person with a disability.
17 What's the nature of your disability?

18 A. So I have a disability related to reading, and I also
19 have attention issues related to ADHD.

20 Q. How does that impact your life?

21 A. It impacts so many different areas. Basically, anything
22 that involves reading, I have to constantly seek out ways to
23 either avoid reading, or ways to use assistive technologies to
24 get through material that's written, like text to speech, and
25 audio books, things like that.

1 As far as focus is concerned, it's something that does
2 impact me on standardized testing, but it also impacts me in
3 other areas as well, you know. When driving, I have to be
4 extremely careful not to have any distractions because I don't
5 want to end up losing focus and, you know, causing something
6 bad to happen with an accident, or something like that.

7 And it's just -- it's something that I'm trying to take
8 steps to limit the effect that my attention issues have; but,
9 you know, even through meditation and working on that, there's
10 only so much I can do. And I've done everything I can to
11 limit the effect it has, but I still have this wall that I
12 just can't get past, and that's where this disability is. And
13 without accommodation, there's no way that I can actually show
14 what I know and what I've achieved through all of the hard
15 work that I've put in.

16 Q. How have your disabilities impacted you with respect to
17 standardized exams?

18 A. So my reading speed is very important for being able to
19 get through exams during certain time constraints. So if I
20 have standardized conditions on an exam without accommodation,
21 it's almost impossible. I mean, I basically have to rush
22 through the exam as quickly as I can, not really understanding
23 anything that I'm reading because I'm not able to read at a
24 speed where I comprehend what I'm reading. And I still, even
25 doing that, run out of time and am not able to finish

1 questions on the exam. And I come back, you know, with
2 basically a score report that doesn't show anything about my
3 knowledge base. It instead shows the fact that I wasn't able
4 to complete the exam in the timed conditions.

5 Q. And how did that impact you with respect to the Step 2
6 CK?

7 A. The Step 2 CK exam has a lot of reading on it, and it's
8 very complicated, the information you have to process and
9 parse. And it definitely had a huge impact, especially the
10 last time, you know. I think that I was only able to read
11 about 60 percent of the exam, and that's by using every single
12 strategy I could to get through it as quickly as possible.

13 Q. I want to discuss your childhood. Let's first start out,
14 what is your native language?

15 A. English.

16 Q. What language were you taught in the house?

17 A. English.

18 Q. What language was spoken to you in the house?

19 A. English.

20 Q. Was French spoken in the house?

21 A. Occasionally, I heard my parents speaking, but they
22 didn't speak it to me.

23 Q. Did you go to a preschool?

24 A. Yes.

25 Q. Did they speak French in the preschool?

1 A. No.

2 Q. Were you taught French in preschool?

3 A. No.

4 Q. What language did they speak?

5 A. English.

6 Q. Did you go to elementary school?

7 A. Yes.

8 Q. Were you taught French in elementary school?

9 A. No.

10 Q. Did you learn French in elementary school?

11 A. No.

12 Q. What language were you taught in elementary school?

13 A. English.

14 Q. Can you speak French now?

15 A. No.

16 Q. Can you speak any language other than English?

17 A. Yes.

18 Q. What language?

19 A. Japanese.

20 Q. When did you learn that?

21 A. When I was 20, I did a year abroad in Japan.

22 Q. When you were in elementary school, did you encounter any
23 educational challenges?

24 A. Yes.

25 Q. Can you describe those?

1 A. So in elementary school, especially in first grade, as we
2 were learning to read and write, and we had to learn the
3 letter sound correspondence, things like that, I was having a
4 lot of difficulty. Exercises that we would do in class, like
5 they would have us write out A is for apple, or something like
6 that, and my writing was so slow that I wasn't able to
7 complete those tasks in the amount of time that the teacher
8 had planned for during class.

9 So as a result, I was sent during -- instead of going out
10 to recess with the other kids, I was sent to a room that was
11 next to the boiler room in the school, and basically, if you
12 hadn't completed your homework, you were sent there. Most of
13 the kids were older kids, but I was one of the young kids that
14 was sent there. And they would have me work basically every
15 day trying to complete the assignments that I couldn't
16 complete in class, and so I was never going out to recess, et
17 cetera.

18 Then when I still was often not able to finish those
19 assignments during that time period, they would send it home
20 with me as part of the homework to complete when I got home.
21 I would do it at home, along with whatever other homework
22 there was, and then bring it back the next day.

23 But every single day the cycle would repeat, where even
24 though I was working consistently and as quickly as I could
25 throughout the entire time that the teacher would give during

1 class, it was never enough. And even with this extra time
2 that they gave me to complete it, it was still not enough.

3 And I wasn't able to normalize, basically, with what the
4 expectations were for the teacher, and it's something that, as
5 a result of that, you know, I -- it was a very extremely
6 challenging year for me when I was in first grade. And I was
7 really confused because I had all these issues in class
8 happening, and at the same time, I knew that when people asked
9 me questions, I could answer their questions, but when it came
10 to reading or writing, I was completely incapable of showing
11 what I had learned. So I was unable to show what I had
12 learned.

13 And at the same time, I'd always had an aptitude for the
14 sciences, and I was being taken into sort of a small group out
15 of the first grade class, and I was put in basically a science
16 enrichment class. They would take kids and put them in that
17 class.

18 So I was very confused because at once I was somebody who
19 could not do these basic skills with all the other students to
20 the level that they were able to, but I was also being told
21 that the school had recognized that I was intelligent, and I
22 was being put in this enrichment class. And I was able to do
23 well in the enrichment class because it was a lecture, sort of
24 seminar format where we would talk, and for me that works.
25 I'm able to express verbally what I'm able to comprehend, et

1 cetera, and so it was a very confusing time for me.

2 Q. I want to go back to the challenges that you experienced.

3 A. Sure.

4 Q. Was this in first grade that you just described?

5 A. This was in first grade, yes.

6 Q. Did you repeat any grades?

7 A. I think my parents held me back, which is why I started
8 kindergarten or first grade late, but other than that, I'm not
9 aware of repeating any grades.

10 Q. During this period of time in first grade, did you have
11 any type of interventions for your educational challenges?

12 A. Yes. I remember doing tutoring basically to work on
13 these literacy skills to try to improve, but I don't remember
14 in detail what --

15 Q. Were there any classes that were provided at the school?

16 A. I don't remember during the school day. I just -- my
17 main thing I remember was going to this room instead of recess
18 every day, so I don't know.

19 Q. And how about at the home, was there any intervention
20 being done at the home to address these challenges?

21 A. Yes. There was a tutor that came, and I would work with
22 them after school at home.

23 Q. And what were you working with with that tutor?

24 A. It was language skills. Basically, the same things we
25 would do in class where, you know, I'd be trying to learn how

1 to write, see if I could improve my speed, and they would
2 basically just try to work on the same things that we were
3 supposed to be learning during the school day but I was not
4 making progress with.

5 Q. And did there come a time that you were home schooled?

6 A. Yes.

7 Q. And for how long were you home schooled?

8 A. So it was second, third, and fourth grade, so three
9 years, I guess.

10 Q. And who provided the home schooling?

11 A. My mother was the teacher.

12 Q. Was there any other additional tutoring or services
13 provided to you regarding your challenges?

14 A. So during home schooling, my mom basically custom made
15 the curriculum so that I could get as much remediation as
16 possible during that time, and so she did that in the home.

17 I also went to a person, her name was Susan Collins. I
18 think she's one of the people who wrote one of the reports.
19 And I remember going to her and working on different literacy
20 skills as well, but I don't know if it was during home
21 schooling or later. I can't remember exactly when that was.

22 Q. Did you have evaluations that were conducted during your
23 elementary school years?

24 A. Yes.

25 Q. And those were evaluations of Dr. Artner, we had seen her

1 one report?

2 A. Yes.

3 Q. And that was in second grade. And you mentioned this
4 Susan Collins. Did she conduct an evaluation?

5 A. Yes.

6 Q. Did you eventually return back to your elementary school?

7 A. So I went back to regular school in fifth grade, but I
8 ended up going to a local parochial school instead of the
9 public school.

10 Q. And which parochial school was that?

11 A. The name is St. Gabriel Consolidated School.

12 Q. What grade does St. Gabriel's go to?

13 A. It goes up through eighth grade. I was there from fifth
14 through eighth grade.

15 Q. Did you have any accommodations when you were at
16 St. Gabriel's?

17 A. Yes.

18 Q. What was the nature of your accommodations?

19 A. I was given extra time to complete in class assignments,
20 as well as examinations, quizzes, tests, whatever. Also, they
21 did oral exams with me, where they would have somebody read
22 the questions to me, and then I would respond orally to it
23 because they knew that I had issues with reading. I was also
24 given, if it was something that I had to do that was written
25 and that couldn't be read to me, then it was something that --

1 it would be like in a small, quiet room as well. And then
2 that was pretty much -- during the school day, those are the
3 main things I could think of.

4 Q. If you turn to Exhibit 1 in the booklet you have there?

5 A. Okay.

6 Q. Can you explain what this is?

7 A. It appears to be a letter from my fifth grade teacher at
8 St. Gabriel's school.

9 Q. And what is the purpose of that letter?

10 A. So she wrote this letter to explain the accommodations
11 that I have had while I was at St. Gabriel's school. And it
12 was something that we included, along with my accommodations
13 request, to the MCAT.

14 Q. And does that document the accommodations you had at
15 St. Gabriel's?

16 A. Yes.

17 Q. Did you eventually press on to high school?

18 A. Yes.

19 Q. Where did you attend high school?

20 A. At Moeller.

21 Q. How long were you at Moeller?

22 A. For four years.

23 Q. Ninth through twelfth grades?

24 A. Correct.

25 Q. Did you encounter any challenges while you were at

1 Moeller?

2 A. Yes.

3 Q. Can you explain what those challenges were?

4 A. So I continued to have similar challenges to what I had
5 earlier, where I had issues related to reading and sustained
6 focus. And while I was at Moeller, I was informally
7 accommodated in the classroom by the teachers. Since it was a
8 private school, they were able to do that. And they gave me
9 extra time to complete tests, et cetera. I had an extra set
10 of textbooks so that I could highlight and aid my
11 comprehension that way. They also did audio books. They
12 would allow me to do that. And I would meet with Jane Kagy to
13 review different remediation skills.

14 Q. Who is Jane Kagy?

15 A. She was a coordinator that worked at Moeller.

16 Q. Was she a coordinating specialist?

17 A. From what I understand, basically her job was to work
18 with the different students that had disabilities or
19 difficulties, and work on the different skills with them, and
20 make sure that their accommodations were implemented in a way
21 that was beneficial while they were at the school.

22 Q. Mr. Burgoyne had mentioned, in his opening, that you did
23 not have accommodations throughout your high school
24 experience. Could you speak to that?

25 A. That's incorrect. I had accommodation. Initially, when

1 I was at Moeller, it was informally granted until I was able
2 to actually have it transition to formal granted after. And
3 that was one of the reasons that we ended up going to
4 Dr. Smith for the evaluation is because my school had already
5 given me accommodation and seen that the accommodation was
6 warranted.

7 And they wanted an updated assessment because they wanted
8 to see if there were any adjustments, and they also felt that
9 since I needed that accommodation in the classroom
10 environment, it would be important for me to continue to have
11 that on the SAT when I took the SAT.

12 Q. So during ninth, tenth, and part of your eleventh grade
13 year, at that time your accommodations were informal?

14 A. At the beginning it was informal, and then it was
15 formalized after the evaluation, I guess.

16 Q. What do you mean by informal?

17 A. So in private schools, they are not required to have an
18 IEP. They don't have to have like a paper trail, and so
19 the -- when students are struggling to finish exams, or things
20 like that, you know, I was routinely -- I was basically always
21 the last student to finish any exam. I was always going to
22 the very last second. And my teachers realized that the
23 questions that I would answer I would have good scores on, and
24 then the ones that would be blank because I ran out of time
25 would be blank, you know.

1 And so it's something where it was in their purview, I
2 guess, to say that they would give me extra time, or they
3 would somehow adjust it so that I could finish those exams,
4 because what they were interested in was to find out what my
5 knowledge was, not how quickly I could complete the exam, and
6 so they did that initially.

7 Q. All right. And what type of informal accommodations were
8 you receiving?

9 A. So it was extra time to complete assignments, as well as
10 tests. The textbooks, it was formalized later, but the extra
11 time was the initial thing. And then I already had support
12 related to audio books, and reading, and things like that in
13 place at home, and that was also formalized later.

14 Q. During your high school years, did you receive any other
15 type of special instruction or tutoring, or anything of that
16 nature, to address your challenges?

17 A. So I met with Jane Kagy, and I worked with her on some
18 things, but other than that, I don't remember. I don't
19 remember any other specific tutoring.

20 Q. If you would, could you turn to Exhibit 2, please.

21 Can you explain what this is?

22 A. This looks like a letter from Jane Kagy.

23 Q. And what is the purpose of that letter?

24 A. So she wrote this letter when I was -- so I first -- I
25 guess I had already transitioned to my undergraduate degree,

1 and it was to document what accommodations I had had
2 throughout high school so that the university would understand
3 what accommodations profile I had needed before, and that
4 would help them with their implementation while I was a
5 university student. And I believe this was also submitted
6 with the MCAT request for accommodation.

7 Q. Does this document accurately the accommodations you
8 received when you were at Moeller?

9 A. I believe so.

10 Q. If you would, could you take a moment to read and make
11 sure?

12 A. (After reviewing document) Yes.

13 Q. Is the information there accurately stating the
14 accommodations you received when you were at Moeller?

15 A. Yes.

16 Q. When you were in the eleventh grade, did you take the
17 PSAT?

18 A. Yes.

19 Q. And what is the PSAT?

20 A. It's a practice test that students take the year before
21 they're going to take the SAT, to get used to the format of
22 the exam, and I guess anticipate how they might perform on the
23 SAT.

24 Q. At the time that you were approaching the PSAT, had you
25 started studying yet for the SATs?

1 A. I don't remember. I think I viewed it as a practice
2 test, so I don't remember.

3 Q. Did your school provide any type of instruction related
4 to the PSAT or SAT that you were taking?

5 A. I do think that they did -- I think we did something as
6 students together. I can't remember how long it was, but
7 maybe a few sessions or something.

8 Q. When you took the PSAT your junior year, did you have
9 accommodations when you took that test?

10 A. On the PSAT, no.

11 Q. Can you describe what occurred when you took that test,
12 when you took the PSAT test?

13 A. Yes. So I took it with other students. It was basically
14 a standardized examination, and because it was a practice
15 test, I wanted to sort of just take it, and I didn't want to
16 have to go through the process of applying for the
17 accommodation on everything because the outcome of the test
18 didn't matter for my advancement in the school.

19 So when I did the test, I was struggling a lot with the
20 time constraints, and I was unable to finish sections on the
21 exam, even though I was skipping and going through as quickly
22 as I could as many questions as I could get through. And not
23 only was my reading speed a factor, but also my processing and
24 attention over the long periods of time was something that was
25 greatly affecting me during that exam.

1 And at the end of that exam, it was obvious to me that if
2 I did the SAT under that same scenario, there's no way that I
3 was going to be able to pass it and adequately move on to
4 undergraduate.

5 Q. If you would, could you turn to Exhibit 3, please?

6 MR. WEINER: I apologize in advance to Your Honor.
7 This was a color document, and it appears that some of the
8 items did not copy. When I return to my office, I can furnish
9 ones that contains all the information.

10 Q. Is this a copy of your PSAT score report?

11 A. Yes, it looks like it.

12 Q. And does this show the answers you provided and furnished
13 for that exam?

14 A. Yes.

15 Q. I wanted to -- and we're looking at the left side of
16 Exhibit 3, and it shows Section 1 and Section 3. What is
17 Section 1 and Section 3 referred to as?

18 A. So the left column is basically a verbal section of the
19 exam, so that Section 1 and Section 3 is verbal.

20 Q. Can you explain what is contained, or the construct of
21 Section 1, the verbal exam?

22 A. Yes. So it's broken down into sections. So they have
23 sentences where it will have basically a sentence with a
24 blank, and then you have to pick a multiple choice answer that
25 would fill in the blank, based on my recollection.

1 They also had a section with analogies, where they would
2 have, you know, this word is to this as this is to, and then
3 blank, and you have to fill in -- pick your answer that would
4 fill in the analogy section.

5 Q. So those were single words or double words that you would
6 be looking at?

7 A. Yes.

8 Q. And the critical reading section?

9 A. Yes. There's also a critical reading section where, if I
10 remember correctly, I think it was similar to the sentences
11 but it was sort of longer, where you'd have longer passages,
12 and then there would be multiple choice questions about it. I
13 can't remember if that was actually sort of filling in blanks,
14 or if it was actually about what the paragraph contained. I
15 don't remember the details exactly.

16 Q. Did you encounter any challenges with taking the verbal
17 section of the PSAT?

18 A. Yes.

19 Q. And explain what your challenges were.

20 A. So I ran out of time on the sections as I was going
21 through. And due to the increased reading in the critical
22 reading sections, I basically ended up going all the way until
23 the last second, but I didn't have time to answer certain
24 questions so I left them blank at the end of the exam.

25 Q. All right. The sentence completion analogies and

1 critical reading, is that all timed as one section?

2 A. Yes, each section has its own timed limit.

3 Q. Right. So sentence completion wouldn't have its own time
4 limit, analogies would not have its own time limit, critical
5 reading would not have its own time limit?

6 A. That's correct.

7 Q. They were all timed as one section?

8 A. Yes.

9 Q. Can you describe what your approach or your strategy was
10 on the verbal section?

11 A. So because there was less reading in the sentence
12 completion and analogies portions, I went through those
13 because I knew I would be able to comprehend them more, and I
14 had more likelihood that I could actually get those questions
15 answered within the limited time that I had. And then with
16 the time I had remaining, I would work through the critical
17 reading section as much as I could until I ran out of time.

18 Q. You had mentioned that you had difficulty reading the --
19 finishing the critical reading section in Section I. Is that
20 reflected on this report?

21 A. Yes. There are blanks at the end here, yes.

22 Q. And what questions did you have to omit On Section 1?

23 A. There are three questions omitted, and they're on the
24 critical reading section.

25 Q. In Section 3, is that also a verbal section?

1 A. Yes.

2 Q. Did you also encounter difficulty?

3 A. Yes.

4 Q. What were your difficulties in in Section 3?

5 A. So it was more of the same because of the reading
6 involved. But at this point, it was later in the day. I had
7 already done the first verbal section, and then a math
8 section, and then a verbal section again, and so I was a lot
9 more fatigued, and it slowed me down. My processing was
10 slower because I had more difficulty focusing, and I omitted
11 several questions at the end of Section 3 as well.

12 Q. Is this reflected on Exhibit 3?

13 A. Yes.

14 Q. How many questions did you omit in the critical reading
15 of Section 3?

16 A. Six were omitted.

17 Q. And why were they omitted?

18 A. Because I ran out of time.

19 Q. By the way, how long a test is the PSAT?

20 A. I know it was all done in one day, but I don't remember
21 how long each section was, but it was multiple hours total.

22 Q. Did you encounter any problems as a result of your
23 impairments on any other sections of the PSAT?

24 A. Yes.

25 Q. Explain what challenges you encountered.

1 A. So I also had difficulty in the math section, because
2 when I do calculations, it requires a lot of intense focus.
3 And when I have to keep details in my mind and do
4 calculations, it's very draining for me. And so I also
5 struggled with running out of time at the end of the math
6 section for Section 2, it looks like.

7 Q. And is that reflected on the report?

8 A. Yes.

9 Q. And how many questions did you omit because of that?

10 A. Six.

11 Q. And that's at the end of this section?

12 A. Yes, that's correct.

13 Q. On the verbal section, do you recall what your score was?

14 A. I remember the -- at the top of this report, they have
15 percentages, so I think that one of them was maybe a 71 and
16 then another one was a 77. I'm not sure exactly if that was
17 the verbal score or what, but --

18 Q. So somewhere in the 70th percentile you scored on the
19 PSAT?

20 A. Yes.

21 Q. And that was on the verbal section?

22 A. I believe so.

23 Q. And on the math section?

24 A. I believe that one was the higher, maybe the 77. I can't
25 remember offhand.

1 Q. And 77th percentile?

2 A. I think so, yes.

3 Q. And you scored that amount, despite having to omit
4 several questions on this exam?

5 A. Correct.

6 Q. Did you eventually take the SAT exam?

7 A. Yes.

8 Q. Did you submit a request for accommodations to The
9 College Board?

10 A. Yes.

11 Q. And how did The College Board respond to your request?

12 A. They responded with granting accommodation and extra
13 time.

14 Q. If you'd turn to Exhibit 4, please.

15 Is this a copy of the accommodation letter of the
16 accommodations you received from The College Board?

17 A. Yes.

18 Q. And what accommodations did you receive?

19 A. They gave 50 percent extra time.

20 Q. Did you utilize that extended time when you took the
21 college board?

22 A. Yes.

23 Q. When did you take the college board?

24 A. I believe it was -- I guess it was my senior year, which
25 was probably 2004.

1 Q. All right. And if you turn to Exhibit 25.

2 Is this a copy of your SAT score report?

3 A. Yes.

4 Q. Other than the score report, did you take the SATs on any
5 other time?

6 A. No, just once.

7 Q. And when you took the SAT, you had accommodations?

8 A. Yes.

9 Q. And what accommodations did you have?

10 A. Extended time.

11 Q. And what was your score on your SAT?

12 A. The reading was 660 and the math was 680.

13 Q. The reading score, in what percentile did you fall?

14 A. 91st percentile nationally.

15 Q. Was that improvement from your PSAT?

16 A. Yes.

17 Q. And at 94 percent, does it indicate, is that compared to
18 whom?

19 A. The national percentile.

20 Q. Of college seniors?

21 A. Of college-bound seniors, yes.

22 Q. The math score, what percentile?

23 A. That was 90 percent.

24 Q. And was that for college-bound seniors as well?

25 A. Yes.

1 Q. Did you graduate from Moeller?

2 A. Yes.

3 Q. Did you eventually matriculate to college?

4 A. Yes.

5 Q. And where did you go to college?

6 A. The University of Cincinnati.

7 Q. When you went to the University of Cincinnati, did you
8 submit a request for accommodations?

9 A. Yes.

10 Q. Did you submit that at the beginning of your college?

11 A. Yes.

12 Q. And to whom did you submit that request?

13 A. So the University of Cincinnati had a Disability Services
14 Office, where they had staff that implemented and managed
15 accommodation for students that had it at the school.

16 Q. And if you turn to Exhibit 27.

17 Does Exhibit 27 accurately document the accommodations
18 you received at University of Cincinnati?

19 A. Yes.

20 Q. Did you have these accommodations during the entire time
21 of your matriculation?

22 A. Yes.

23 Q. Can you state what your accommodations were?

24 A. So extended time, double time, proofreader, and audio
25 versions of written text.

1 Q. Can you explain your use of the audio version of written
2 text?

3 A. Yeah. Basically, because there's a lot of reading in
4 college studies, and I have difficulty related to reading,
5 they provided me with audio versions. They actually didn't
6 have text to speech at the time, they had student readers that
7 would read and produce MP3 files, and then that would be given
8 to me. And I would use that to listen to the material as I
9 would go through the assignments, and that allowed me to get
10 through them and keep pace with the class.

11 Q. And your extended time, that was double time?

12 A. Yes.

13 Q. Where did you take your exams?

14 A. At the Disability Services Office.

15 Q. Did you ultimately graduate from the University of
16 Cincinnati?

17 A. Yes.

18 Q. And what did you graduate with?

19 A. I had a BS in biology and a BA in Asian studies.

20 Q. Did you have any postgraduate time at the University of
21 Cincinnati?

22 A. Yes. I did some postgraduate classes.

23 Q. And what was the purpose of those?

24 A. So at that time, I was still figuring out what was
25 happening with the MCAT, and I wanted to continue to keep my

1 skills fresh so that if I was able to go on to medical school,
2 I would be as ready as possible, so I continued taking those
3 classes to keep my skills fresh.

4 Q. When you were taking those classes at the University of
5 Cincinnati, did you have accommodations then?

6 A. Yes.

7 Q. And were they consistent with the accommodations that are
8 shown on Exhibit 27?

9 A. Yes.

10 Q. At some point in time, did you make a decision to go to
11 medical school?

12 A. Yes.

13 Q. And in terms of applying for medical school, you had to
14 take the MCAT?

15 A. Correct.

16 Q. And can you discuss your effort studying for the MCAT?

17 A. Yes. So I took a Kaplan prep course to prepare for it,
18 and I also worked through practice questions for many hours to
19 prepare.

20 Q. Can you give a sense of how many hours you would study
21 every day?

22 A. I was still doing courses, so it was more limited since I
23 had other things I had to do, but I would guess maybe around
24 three hours a day, or something like that, if I could manage
25 it.

1 Q. And when was it that you were planning to take the MCAT?

2 A. So I wanted to take it near the end of my time at the
3 University of Cincinnati. I can't remember --

4 Q. Is that around 2009?

5 A. I can't remember if it was 2009 or 2008 when I decided
6 to, but yes.

7 Q. And ultimately did you take the MCAT?

8 A. Yes.

9 Q. And you took it September 2009?

10 A. That sounds correct.

11 Q. Prior to taking the MCAT in 2009, did you apply for
12 accommodations?

13 A. Yes, I did.

14 Q. And what was the -- and AAMC administers the MCAT?

15 A. Yes.

16 Q. And how did AAMC respond to your request for
17 accommodations in 2009?

18 A. They denied the request for accommodations.

19 Q. Did you ultimately take the MCAT in 2009?

20 A. Yes.

21 Q. And did you take it without accommodations?

22 A. Yes.

23 Q. Describe your study strategy when taking the MCAT in
24 2009.

25 A. So I -- as I said, I did the prep course, and I did

1 practice questions to try to be as ready as possible and
2 process the questions quickly.

3 Q. Were you aware of other students similarly situated to
4 you who were also studying for the MCAT?

5 A. Yes.

6 Q. Can you compare your study efforts to your peer's study
7 efforts?

8 A. Yes. So to me it didn't seem like my study was out of
9 the ordinary because every time that I have to do schoolwork
10 and prepare, it always takes me a lot longer to complete
11 things. So I'm used to spending many, many hours to finish
12 things, and preparing, and go through it.

13 And a lot of the other students told me that they thought
14 I was very intense because of the fact that I was studying so
15 much for it, but I knew that if I had a good chance at the
16 exam, it would allow me to go to medical school. And it was
17 something that was very important, to optimize my performance
18 on it if I could, so I studied as much as I could within the
19 time constraints.

20 Q. When you actually took the exam in September of 2009, can
21 you discuss your strategy while taking the exam?

22 A. Yes. So when I took the exam in 2009, it was without
23 accommodation, just -- I don't know if this is relevant, but
24 we had requested accommodation, and I had scheduled the exam
25 at the time that we requested the accommodation from AAMC.

1 And on their website, they basically said that they wanted you
2 to schedule an exam, and at least you would have an exam date
3 scheduled.

4 So we hadn't heard back from the AAMC. They hadn't given
5 a decision one way or another. And because I had the exam
6 scheduled, I viewed it as a practice test basically, again,
7 kind of like the PSAT, but this time I had been preparing
8 because I expected to have a decision about accommodation
9 back.

10 And so when I took the exam, I did as many strategies as
11 I could to go through it; but, again, it was difficult to
12 impossible for me to finish the sections within the time limit
13 given, and particularly the verbal section was difficult
14 because it had so much reading. It basically has long
15 passages, and then it has like four or five questions about
16 those passages.

17 And I tried to go through as quickly as I could and mark
18 answers down so I wouldn't leave anything blank, but I wasn't
19 able to understand the questions very well because I was
20 rushing through and I wasn't able to really read the material
21 in the sections. But it also affected me in the physical
22 sciences and biology sections as well, not just the verbal
23 section. So I had basically marked answers, but they were
24 kind of random because I didn't understand what the questions
25 were asking.

1 Q. Were you able to complete each section of the MCAT?

2 A. I ran out of time, but I marked random questions so that
3 nothing would be left blank.

4 Q. Do you feel that you were able to demonstrate your
5 knowledge and skill that you possessed when you were taking
6 the MCAT in September 2009?

7 A. No.

8 Q. And if you turn to Exhibit 5, please. I'm sorry, 55,
9 please.

10 What is Exhibit 55?

11 A. This looks like my school report from 2009 on the MCAT.

12 Q. And does this report also reflect the various percentiles
13 of how you ranked on that exam?

14 A. Yes.

15 Q. And at the time that you took that verbal reasoning, that
16 was the one that you said had the most reading?

17 A. Yes.

18 Q. And your percentile rank was what?

19 A. The percentile range was 27th to 37th percentile.

20 Q. And your writing sample?

21 A. 11th to 35th percentile.

22 Q. And the other percentiles on the other subject matters
23 were increased beyond the -- were better than the writing and
24 the verbal?

25 A. Yes, that's correct.

1 Q. Did you ultimately take the MCAT a second time?

2 A. Yes.

3 Q. And when did you take the MCAT a second time?

4 A. I believe it was in 2010.

5 Q. Was it October 2010?

6 A. That sounds right.

7 Q. So that was a year after Exhibit 55?

8 A. Yes.

9 Q. During that year, what did you do?

10 A. So after the exam in 2009, I got the letter from AAMC
11 saying that they had denied the first accommodations request,
12 and that part of the reason for that was that they didn't
13 think there was enough supporting documentation. I guess they
14 wanted further testing.

15 So I went back to the psychologist, and he did further
16 evaluation, and we submitted another request for accommodation
17 to the AAMC, and we waited for the response before I took the
18 MCAT a second time.

19 Q. And did you also, in the interim, go see Dr. Beach the
20 first time in 2010?

21 A. I believe so. I think I saw her before I took the MCAT
22 the second time.

23 Q. And it sounds like you had submitted a few requests to
24 the AAMC for accommodations?

25 A. Yes.

1 Q. And they were denied?

2 A. Yes.

3 Q. Did you ultimately take the MCAT a second time?

4 A. Correct.

5 Q. That was in October 2010?

6 A. Yes.

7 Q. Can you describe your study efforts prior to the October
8 2010 MCAT?

9 A. Yes. So I went back to Kaplan again and actually did the
10 review course again, and I also did more study. I
11 specifically -- because I had run out of time and I had found
12 out that I was denied accommodation again after the second
13 request, I specifically was working on trying to get through
14 the questions as quickly as possible so that I could finish as
15 much of the exam as possible, and seeing if there were any
16 strategies I could come up with to optimize my score so that I
17 could end up successfully applying to U.S. medical schools.

18 Q. It's a year difference, roughly, between the two exams,
19 the September 2009, October 2010 exam?

20 A. Yes.

21 Q. Did you take that entire year to study?

22 A. Most of it.

23 Q. And about how many hours a day would you work on studying
24 for the MCAT?

25 A. I think it was -- this time it was more, because part of

1 that year I wasn't doing classes, so I was able to spend some
2 more time. I don't know. Maybe three to five hours,
3 depending.

4 Q. When you took the MCAT, can you describe what strategies
5 you utilized during the MCAT?

6 A. Yes. So particularly in the verbal section, because I
7 had not been able to understand what was written in that
8 section, my approach was to actually not read the passages at
9 all. Basically, they have long multiple paragraph passages,
10 and then they have five questions, or something like that.

11 What I did is I didn't read the passages at all. I just
12 read the questions. And based on the sentence or two that was
13 in the question, then I would try to pick what I thought the
14 best answer was.

15 And so if it was a question about, you know, why did the
16 author use such and such a word in this part of the paragraph,
17 I had no idea how the author used it, but if I knew what the
18 word meant, then I could make an educated guess about how to
19 answer that question because I knew what the definition of
20 that word was. And so I was able to answer questions like
21 that, but it was making my best guess and kind of randomly
22 guessing on ones that I didn't have any intuition about where
23 I should go because I didn't have access to what was in the
24 paragraphs, but that effectively gave me the extra time I
25 needed to actually read through the questions and answer them.

1 Q. Did you discuss this strategy with Dr. Beach during her
2 various evaluations of you?

3 A. It's possible. I might have.

4 Q. When you refer to guessing, is that what you're referring
5 to, what you just testified to?

6 A. Yes. That's what -- yep.

7 Q. After you took the MCAT in October 2010, did you send an
8 email to Dr. Beach and indicate that you felt good about your
9 time management?

10 A. So I believe so. I know that I had discussed with her
11 sort of some of the strategies. I think I had asked her if
12 she had any suggestions when she had worked with other
13 students about how to optimize my timing, so it's possible
14 that I would have said that, yeah.

15 Q. Did you say you felt good about your time management
16 during the exam?

17 A. I think that -- sure. I don't remember specifically, but
18 I could see myself saying that, because if I was able to
19 institute my strategies optimally, then that was the best I
20 could do within the time constraints given, even though I was
21 still not able to access and answer the questions as I would
22 have been able to with extended time.

23 Q. What did you mean by you felt good about time management?

24 A. So to me that means that the strategy that I went into
25 the exam with, I was able to successfully implement that

1 strategy. So for me that was basically skipping the verbal
2 sections and just reading the questions and not reading the
3 paragraphs.

4 Q. Could you turn to Exhibit 30.

5 Is this a copy of your score report for the 2010 MCAT?

6 A. Yes.

7 Q. And it reflects that you had improved in the area of
8 verbal reasoning?

9 A. Yes.

10 Q. Can you explain how you were able to improve that?

11 A. So because I was able to actually take the time I needed
12 to read the questions, the sentences, and then the answer
13 choices, I was able to make an educated guess about what the
14 correct answer might be and show what my understanding was of
15 those questions, even though it was an incomplete version of
16 that section because I hadn't read the paragraphs.

17 Q. Was this a different strategy that you employed from the
18 2009 MCAT?

19 A. Yes.

20 Q. Did you apply for medical school in -- well, first of
21 all, after the 2009 MCAT, did you apply to medical school?

22 A. I only applied to medical school once, and I think it was
23 after this was finished.

24 Q. All right. And did you gain acceptance to medical
25 school?

1 A. Not in the United States.

2 Q. How about outside of the United States?

3 A. So after the U.S. didn't work out, I ended up applying to
4 Caribbean schools, and I was accepted at the American
5 University of the Caribbean in St. Maarten.

6 Q. In what year were you accepted?

7 A. I started there in May of 2011. So they do rolling
8 admissions, so I'm assuming it was shortly before that.

9 Q. And when did you start at AUC?

10 A. May of 2011.

11 Q. What is the expected graduation at AUC?

12 A. So medical school is four years, so four years from May
13 2011 would be May of 2015.

14 THE COURT: Mr. Weiner, excuse me. Are you at a
15 section where maybe we can take a short break and then
16 continue on?

17 MR. WEINER: Yes. Sure, Your Honor. I'm at a good
18 place.

19 THE COURT: Great. Let's take a ten-minute break.

20 (Brief recess.)

21 BY MR. WEINER:

22 Q. Mr. Berger, can you talk about the program at AUC, where
23 your didactics take place, where your clinicals take place?

24 A. Yes. So as I said before, medical school is four years,
25 and you do two years of book work and then two years of

1 clinical rotations in the hospital.

2 So at AUC, the book work is done on the island of
3 St. Maarten in the Caribbean, and then you come back to U.S.
4 hospitals to do rotations for two years.

5 Q. And did you do your rotations at U.S. hospitals?

6 A. Yes, in New York City.

7 Q. When you went to AUC, did you request accommodations?

8 A. Yes.

9 Q. And then can you discuss the process of doing that?

10 A. So basically, it included just giving your documentation
11 to a member of staff who was in charge of reviewing the
12 accommodations request.

13 Q. And were you approved for accommodations?

14 A. Yes.

15 Q. What accommodations were you approved for?

16 A. They provided me with 50 percent extra time, but I did
17 ask for a hundred percent extra time since the accommodation
18 of 100 percent extra time had been given in the past. But she
19 told me that she only was able to approve 50 percent extra
20 time because that's all that they provided to their students.

21 Q. What accommodations did you utilize during your time at
22 AUC?

23 A. I used the extra time accommodation.

24 Q. All right. My understanding is medical school has an
25 awful lot of reading?

1 A. Yes.

2 Q. How did you manage the reading?

3 A. I used text to speech, and different assistive
4 technologies like that to get through reading.

5 Q. And while you were in medical school, did you have any
6 evaluations conducted?

7 A. Yes.

8 Q. And who conducted that evaluation?

9 A. I had an evaluation performed by Dr. Beach, and I believe
10 it was in 2013, maybe 2012, in anticipation of submitting a
11 request on the USMLE Step 1 exam for accommodation.

12 Q. When you took exams in medical school, can you describe
13 the exams, the construct of those exams?

14 A. They were computer-based exams that were multiple choice.
15 And basically the different teachers would make the exams, and
16 then we would be given that. And then for the final exams,
17 sometimes they would have an in-house exam they would use, but
18 sometimes they would have shelf exams that they would use.

19 Q. What's a shelf exam?

20 A. A shelf exam is an exam -- I believe that they're all
21 made by the NBME, and they're exams that are given to medical
22 students sort of to, I guess, check their knowledge base after
23 they've completed a certain topic.

24 Q. The exams in medical school, about how long would they
25 be?

1 A. So the final exams were longer, but most of the regular
2 exams under standard administration were maybe an hour, an
3 hour and a half. I can't remember exactly, but the final
4 exams would have been longer.

5 Q. All right. About how long would they be on the standard?

6 A. I'm guessing maybe two to two and a half hours maximum.

7 Q. And how about the shelf exams, what's the standard amount
8 of time for the shelf exams?

9 A. So at that time, I think the shelf exams were maybe
10 around that length, I can't remember, but later --

11 Q. What's "that length"?

12 A. I'm assuming two and a half exams -- or hours.

13 Q. And the accommodations you had, they apply to your
14 medical school exams?

15 A. Correct.

16 Q. And so you had time and a half?

17 A. Yes.

18 Q. And the shelf exams, which you described were NBME-type
19 exams?

20 A. Yes.

21 Q. Did you have extended time on those?

22 A. Yes. My school gave me extra time on that.

23 Q. And where were they administered?

24 A. So they were computer-based tests, and they were
25 administered at my school.

1 Q. What has been the impact of your disability?

2 A. Well, it's been something that, you know, it's affected
3 my whole life, from early childhood to today. It's something
4 that, you know, for a long time I actually wasn't sure if I
5 wanted to go into medicine because I was concerned that the
6 reading, and all of that required information sort of
7 processing was going to be too much for me to complete given
8 the time constraints. But because I had text to speech and
9 audio stuff, I've been able to get through as much of that as
10 I could within the time constraints, so that has helped.

11 But you know, in daily life, when I am doing regular
12 activities, like even going to the doctor and they give me
13 forms to read and all of that, it's an issue because I can't
14 read them quickly enough, so I always request to have like an
15 advanced copy if I can review it beforehand. I have to allow
16 myself extra time to complete even what seems like routine
17 tasks for most people.

18 Q. Do you read for pleasure?

19 A. No.

20 Q. Why?

21 A. It's extremely grueling. So I'm not -- number one, my
22 comprehension when I read is a very, very hard one, so it's
23 something where I -- when I'm processing, I am never sure if
24 I'm reading the information correctly off the page. So
25 sometimes I'll read something, and I think I read it

1 correctly, but actually what my brain is telling me I read is
2 wrong, and so when I'm going through a book or any written
3 material, I never know if I'm actually able to access what is
4 actually written on the page. Is it because I misread
5 something and there are typos? Or is it because the author
6 miswrote something, or is it because I misread it? And
7 because of that, and the intense focus demands to sustained
8 reading, it's not something I can enjoy, because it's
9 basically like -- I mean, I guess there's some people that run
10 miles and they really enjoy that vigorous activity, but for me
11 that's what it feels like, and it's something that's constant
12 attention, constant focus, and it's extremely draining. And
13 so instead, if I want to enjoy a book, I always will listen to
14 audio books instead.

15 Q. And is that your method, or your alternative method, of
16 enjoying novels?

17 A. Yes. I enjoy audio books, and I actually get through
18 quite a few books a year that way.

19 Q. You've also mentioned that you have Attention Deficit
20 Hyperactivity Disorder, or ADHD?

21 A. Yes.

22 Q. Can you explain what that is?

23 A. So when you have ADHD, it is something where you have
24 difficulty with concentration and holding your focus. So if
25 you are trying to shift your focus, it can be a difficulty.

1 And also if you're trying to hold your focus, it can be a
2 difficulty, and so that can affect any activity that I'm
3 doing. I don't always notice when I lose my focus, I'll just
4 afterwards, I'll be lost, and then I'll realize that my focus
5 had gone and then I have to kind of recenter.

6 I have tried to optimize my focus shifting ability by
7 doing meditation. I started that as a teenager, and it's
8 something that has helped somewhat for me to at least notice
9 when my attention has wandered and then I can bring it back.
10 But any activity I'm doing, if I lose my focus, it can be an
11 issue.

12 Q. At some point in time, did you have to take a medical
13 licensing exam?

14 A. Yes.

15 Q. Can you first discuss what is the requirements with
16 respect to medical licensure?

17 A. Sure. So medical school is usually four years. You have
18 two years of book work, then you have the USMLE Step 1 exam
19 that you pass. And then most schools, after you pass the
20 Step 1 exam, then you start that second half of your
21 curriculum where you have two years in the hospitals.

22 And during those two years in the hospitals, you take the
23 Step 2 CS exam and the Step 2 CK exam. And as far as my
24 school is concerned, and most schools, you're required to pass
25 all three of those exams; the Step 1, the Step 2 CS, and the

1 Step 3 in order to graduate.

2 Q. And the Step 2 CK as well?

3 A. I'm sorry, yeah, CK. Step 3 is done after residency,
4 usually, after you start residency.

5 Q. You don't need to pass the Step 3 in order to graduate?

6 A. That's correct.

7 Q. But you would need to pass that in order to obtain
8 licensure as a medical doctor?

9 A. Yes, that's correct.

10 Q. So at the end of your second year, did you plan on taking
11 the USMLE Step 1?

12 A. Yes.

13 Q. Did you plan on requesting accommodations?

14 A. Yes.

15 Q. First, in terms of your study efforts for the Step 1, can
16 you describe that?

17 A. Yes. So most students spend a month or more preparing
18 for this exam because it's extremely demanding. At my school,
19 it is traditional, and most students take one leave of
20 absence, which is about three months, three or four months, to
21 prepare for the exam.

22 I applied for accommodation on the Step 1 exam, and due
23 to the time that I was waiting for the response about the
24 accommodation, I ended up actually taking two leaves of
25 absence during that time. And during that entire two leaves

1 of absence time, I prepared for the exam, and I studied all
2 day, every day, you know, as many hours as I could. It was --
3 my only job was to prepare for this exam, and so it was
4 basically six months of endless studying, yeah.

5 Q. And you mentioned you applied for accommodations to the
6 NBME?

7 A. Yes.

8 Q. Prior to applying, did you review any material regarding
9 instructions about applying for accommodations with the NBME?

10 A. I think that they have some -- maybe there's some
11 information posted on their website about how the process
12 works. I don't particularly remember.

13 Q. At the time, did you review that information?

14 A. Sure.

15 Q. And if you turn to Exhibit 56, and you could just kind of
16 bend to it quickly. I don't have many questions about that.

17 A. This looks similar to what I would have reviewed at the
18 time.

19 Q. Did you make your best effort to comply with that request
20 when applying for accommodations?

21 A. Yes.

22 Q. Can you describe the application process for applying for
23 accommodations?

24 A. So when you make an application, one of the things that's
25 asked for is a current assessment of your functioning to see

1 what your disability is, as well as documentation about
2 accommodations you've had in the past, at school, in your
3 life, and on different testing that you've had, different
4 tests you've taken, like the MCAT, or GRE, et cetera.

5 Q. In Exhibits 12 through 36, are these a copy of the
6 documents that you furnished to the NBME in connection with
7 your request for accommodations?

8 THE COURT: For the record, do you want to identify
9 what each of those are, please?

10 THE WITNESS: Okay.

11 MR. WEINER: Yes. Exhibits 12 through 36 are the
12 documents that Mr. Berger submitted to the NBME in regard to
13 his 2013 request for accommodations on the USMLE Step 1.

14 Q. Exhibit 12, can you explain what that is?

15 A. Yes. This is a letter that I wrote where I explain what
16 my disability is, what my history is with that disability, and
17 how it has affected my life.

18 Q. And if you would, can you look down to the fourth
19 paragraph on PX223 of Exhibit 12. It begins "in the first
20 grade." Can you read that out loud, please?

21 A. Okay. "In the first grade, I was already having
22 difficulty with reading and writing. I made little progress
23 with the whole language approach that was used at my school,
24 and I was often unable to finish written assignments in the
25 amount of class time our teacher had allotted."

1 Q. Is this describing what you had testified to earlier?

2 A. Yes. I'm sorry. Would you like me to continue?

3 Q. No, that's fine. Your letter and cover letter is dated
4 October 3, 2013?

5 A. Yes.

6 Q. Is this the approximate time that you were putting
7 together your application?

8 A. Yes.

9 Q. In papers filed that NBME has filed with this court, it's
10 represented that they received your request on October 14,
11 2013. Does that comply with when you had submitted your
12 documentation?

13 A. That sounds correct.

14 Q. Did you also attempt, in Exhibit 12, to describe your
15 compensatory strategies to the NBME?

16 A. Yes, I believe so.

17 Q. Can you review and indicate where you describe your
18 compensatory strategies?

19 A. I think it's probably on the second page.

20 Q. That's PX 224?

21 A. Yes.

22 Q. And what is it that you are attempting to convey?

23 A. So I talked about the fact that one of the things that I
24 mentioned here is when I was like at mass, I can't read the
25 prayers along with the other members of the congregation, so

1 I've had to memorize the responses. And there's a thing
2 that's done where everyone is supposed to read as the crowd,
3 and I can't read that with them, so I don't say anything at
4 all for that portion.

5 And then I also talk about when I was working in a
6 research lab, basically they would have me -- they would give
7 me documentation to review to learn different approaches for
8 like basic science techniques, like bench work, basically it
9 would be like a lab technique, and it would be a sequence of
10 different things you'd have to do.

11 When I was given that type of information, and I wasn't
12 given text to speech and I had to just read it, I wasn't able
13 to read through that information quickly enough to actually
14 prepare adequately to do whatever it was. So what would
15 happen is the person at the lab would usually go through the
16 process with me, and they would basically teach you once,
17 expecting that you would have already read the material and
18 understood.

19 And so what I had to do was basically memorize everything
20 that they did as they did it so that then later on I could do
21 it myself, but I didn't have the benefit of the written
22 materials that they had provided beforehand.

23 Q. Exhibit 13, is this like an index of all the
24 documentation you provided to the NBME in connection with your
25 request for accommodations on the Step 1?

1 A. Yes, that is correct.

2 Q. And did you provide this index as well?

3 A. I believe so, yes.

4 Q. Exhibit 14, is this a copy of the application that the
5 NBME requires that you complete?

6 A. Yes. This is the request for test accommodations form.

7 Q. And if you would turn to Exhibit -- same Exhibit 14, to
8 page 230, PX230.

9 A. Okay.

10 Q. Do you indicate what accommodations you're requesting?

11 A. Yes.

12 Q. And what accommodations did you request?

13 A. So I requested 50 percent additional time over two days
14 for the exam, and additional break time for over two days, as
15 well as a test reader or a recorded version of the exam, in a
16 distraction-limited environment.

17 Q. If you would turn to PX231 of Exhibit 14, is this where
18 you identify your impairments?

19 A. Yes.

20 Q. And the impairments you identified are what?

21 A. Issues with reading, writing, and ADHD.

22 Q. And on PX232 and 233, do you discuss your accommodations
23 history on these pages?

24 A. Yes. This contains a summary of that.

25 Q. And Exhibit 15, can you describe what Exhibit 15 is?

1 A. This is the certification of prior test accommodations.
2 It's a form that my school was required to fill out to show
3 the NBME what accommodations I had during my time as a medical
4 student.

5 Q. And what accommodations did they document you received in
6 medical school?

7 A. Fifty percent extended time in a distraction-limited test
8 setting.

9 Q. Exhibit 16, can you explain what that is?

10 A. This is a copy of a report by Mrs. Collins, and I believe
11 it was performed in 1992.

12 Q. And how old were you at that time?

13 A. According to this, I was six years old.

14 Q. You were in kindergarten?

15 A. I would guess so, maybe. I'm not sure. I would think
16 so.

17 Q. And Exhibit 17, this is an evaluation from Dr. Artner?

18 A. Yes.

19 Q. And that was an evaluation that was conducted in second
20 grade?

21 A. I believe so. I think I was 8-years-old.

22 Q. Okay. Exhibit 18, is this something you provided to the
23 NBME?

24 A. Yes.

25 Q. Why did you provide this?

1 A. So this is the Stanford Achievement Test. And it shows
2 that I have very low scores in certain areas of the test, and
3 then high scores in other areas of the test. Particularly the
4 thing that I remember talking to Dr. Beach about before we
5 submitted this is the fact that my spelling scores were
6 extremely low, and my listening and comprehension scores were
7 very high.

8 Q. And on Exhibit 18, when was this standardized test
9 performed?

10 A. I'm -- so it says here, this was in 1994 -- wait. I
11 don't know. This is grade two. Second grade.

12 Q. What is Exhibit 19?

13 A. So this is the Stanford Achievement Test from the
14 following year, because I took it each year for three years in
15 a row. And this is for grade three.

16 Q. And Exhibit 20?

17 A. This was the next year during grade four, same exam, type
18 of exam.

19 Q. And Exhibit 21?

20 A. This is a score report from the Iowa Tests. I think I
21 took this in sixth grade, I think.

22 Q. And Exhibit 22, and I believe we have seen this document
23 before, this is the accommodations you received at St.
24 Gabriel's?

25 A. Yes. This is a letter from my fifth grade teacher at St.

1 Gabriel's, yes.

2 Q. That was provided to the NBME?

3 A. Yes.

4 Q. Exhibit 23, what is this?

5 A. This is an evaluation report from Dr. Smith for the
6 evaluation he performed in 2003.

7 Q. And you were in eleventh grade at that time?

8 A. Yes, I believe so.

9 Q. Exhibit 24, this is a copy of your accommodations from
10 The College Board?

11 A. Yes.

12 Q. And Exhibit 25, which we looked at before, that's your
13 score report for the January 2004 College Board exam?

14 A. Yes.

15 Q. And you provided that to the NBME?

16 A. Yes.

17 Q. And Exhibit 26, is this the documentation of your
18 accommodations while you were in high school?

19 A. Yes.

20 Q. And that was provided to the NBME?

21 A. Yes.

22 Q. Exhibit 27, this is a copy of the accommodations you
23 received from the University of Cincinnati?

24 A. Yes.

25 Q. And you provided a copy of this to the NBME?

1 A. Yes.

2 Q. And Exhibit 28 is your University of Cincinnati
3 transcript?

4 A. Yes.

5 Q. And is that something that's requested by the NBME in
6 request for applications for accommodations?

7 A. I believe so, yes.

8 Q. And Exhibit 29, what is this?

9 A. So this is another report by Dr. Smith from 2008.

10 Q. All right. And you provided a copy of that to the NBME?

11 A. Yes.

12 Q. Exhibit 30 is your score report for the 2010 MCAT?

13 A. Yes.

14 Q. And you provided that to the NBME?

15 A. I believe so. I don't remember if it was 2009 or 2010,
16 but I know there was an MCAT score report, yes.

17 Q. Exhibit 31, is this a copy of the denial letter that you
18 received from the MCAT?

19 A. Yes, it looks like it.

20 Q. And you provided a copy of that to the NBME?

21 A. Yes.

22 Q. And Exhibit 32, what is this?

23 A. So this is a report from Dr. Smith that he prepared in
24 2010. After we had gotten the initial denial from the MCAT
25 asking for further evaluation and testing, he did further

1 testing and then wrote up this addendum report.

2 Q. Right. How many times were you evaluated by Dr. Smith?

3 A. I think it was three times.

4 Q. Okay. And Exhibit 33, what is Exhibit 33?

5 A. So this is a letter that my mother wrote, and we included
6 with our application, explaining the accommodations that I
7 have had during my home schooling years.

8 Q. And she was the person who provided your home school
9 education?

10 A. Yes.

11 Q. And you provided that to the NBME?

12 A. Yes.

13 Q. And Exhibit 34, what is this?

14 A. So this is a report from Dr. Beach that she wrote in
15 2010.

16 Q. And 2010, is that the first time that you saw Dr. Beach?

17 A. I believe so, yes.

18 Q. Why did you go to Dr. Beach?

19 A. So when we submitted the report from Dr. Smith to the
20 MCAT the first time when they came back with their denial,
21 they said that they wanted further testing and they needed
22 basically more data, and in the meantime, it was denied. So
23 he wrote up the addendum. We submitted that to the MCAT and
24 they denied that again. And when that happened, I went to the
25 Disability Services Office --

1 Q. Where?

2 A. -- at the University of Cincinnati, and I explained the
3 situation to them. And I said, you know, I've submitted two
4 reports for accommodation, the, you know, psychologist, you
5 know, he's provided everything that he thinks he needs to
6 provide to them, so all I can imagine is that, you know, he
7 doesn't know where to go from here. Do you have anybody you
8 can recommend that is more familiar with this kind of testing
9 and could do a more comprehensive evaluation, so we can give
10 them all the information that they need to help them make a
11 decision and show them that I do fulfill the criteria. And
12 they recommended Dr. Beach.

13 Q. And the exhibits, we just went through those, are all the
14 documents that you submitted to the NBME in connection with
15 your request for accommodations on the USMLE Step 1?

16 A. I don't remember. Was Dr. Beach's 2013 report listed in
17 here as well? I don't remember if we covered that or not, but
18 that was also included.

19 Q. So let me address that. I believe that's Exhibit 6.

20 A. Yes. This was the 2013 report that was included as well.

21 Q. And is that a second evaluation that you went to with
22 Dr. Beach?

23 A. That was the second time that I went to her, yes, that's
24 correct.

25 Q. And you submitted Exhibit 6 to the NBME in connection

1 with your USMLE Step 1 request for accommodations?

2 A. Yes.

3 Q. How did the NBME respond to your request for
4 accommodations?

5 A. I received a letter stating that they denied
6 accommodation.

7 Q. And if you turn to Exhibit 37.

8 Is Exhibit 37 a copy of the denial letter you received?

9 A. Yes.

10 Q. Did you agree with the denial?

11 A. No.

12 Q. Can you explain why you don't agree with it?

13 A. So I felt that we had submitted so much documentation.
14 All of the evaluators that I had worked with had felt that I
15 needed accommodation; and, you know, if it hadn't been for
16 those recommendations by them, I wouldn't have had
17 accommodation in the school system, et cetera. And I was
18 frankly very confused when I received this letter from the
19 NBME stating that they were denying, because I couldn't
20 possibly think of more documentation that we would have
21 provided that would have helped them make a decision in
22 regards to this matter.

23 Q. The date of the letter is December 23, 2013. Does that
24 comport with your recollection as to when you received it?

25 A. Yes.

1 Q. Based on NBME's acknowledgement that they received your
2 documentation on October 14th, and the date of this denial, is
3 that roughly 70 days it took them to make this denial?

4 A. That sounds correct.

5 Q. Did you appeal this denial to the NBME?

6 A. I didn't, because after this denial came through, my
7 scheduling permit was issued for me to take the Step 1 exam
8 without accommodation. And if you take the step exam and you
9 pass the step exam, you're not allowed to take the step exam
10 again. If you pass it, you can never take it again, is my
11 understanding.

12 And so basically, after I took the exam and I passed with
13 a very low score, there was no way for me to appeal it because
14 I had passed the exam and I wouldn't be allowed to take the
15 exam again.

16 Q. So I take it you did take this Step 1 without
17 accommodations?

18 A. Yes.

19 Q. Can you describe your study strategy?

20 A. Yes. So when I was preparing for Step 1, that's when I
21 took two years of absence, and I was preparing all day long,
22 every day, maybe 12 hours a day, something like that, if I
23 could. Obviously, I had to take breaks because it's hard for
24 me to stay focused that long, but yeah.

25 Q. How would you describe your knowledge base and

1 preparedness for your Step 1 exam?

2 A. I felt extremely prepared.

3 Q. Can you describe your strategy when you actually took the
4 USMLE Step 1?

5 A. Yes. So when I took the Step 1 exam under standard
6 conditions, I knew that time management was going to be very
7 important because I knew that with my reading speed and my
8 ability to process the information, there's no way I was going
9 to be able to read everything and comprehend and answer the
10 questions.

11 So my strategy was to basically speed through as quickly
12 as I could, and I actually would read the last sentence. So
13 the way that the questions are made, they have multiple
14 sentences, and then the last sentence or two has the question.
15 So it'll say, you know, what is the diagnosis, or something
16 like that, and then their answer choices below that.

17 But in order to understand what the diagnosis is, you
18 have the paragraph above that you're supposed to read. So
19 what I would do is I would read that last sentence. And then
20 sometimes you can actually answer the question based on just
21 that one sentence or a sentence before it, there was only one
22 or two sentences, and so if I could answer the question that
23 way, I would.

24 And then on the other ones, I would try to go through as
25 quickly as I could looking for key words because I knew I

1 wouldn't have a chance to read the actual full questions. And
2 I rushed through, and I basically was running out of time in
3 every section. And in order to not leave anything blank, I
4 marked answer choices so that I would have everything answered
5 and I wouldn't leave anything blank.

6 Q. Can you describe the construct of the USMLE Step 1?

7 A. So the questions are -- I guess you would describe them
8 as clinical vignettes. So they'll describe a patient, or a
9 certain scenario, or a disease process, or something like
10 that, and then you're supposed to read that and then
11 understand what's going on with that patient. And then on
12 Step 1, the questions will be about, you know, how does that
13 disease work, or, you know, what is the name of this disease,
14 or things like that.

15 Q. How long of an exam is it?

16 A. It is divided into hour long blocks, and there are, I
17 think, seven blocks, and then you have, I think it's one block
18 of break time. So it's basically eight hours of -- the test
19 day is about eight hours long for a standard administration.

20 Q. Have you ever taken an exam this long?

21 A. Not as part of my schooling, no.

22 Q. What kind of challenges did it present to you in terms of
23 your impairments?

24 A. It was extremely tiring and grueling, and I felt that I
25 had no comprehension of what was on the exam. I remember

1 walking out of the exam at the end and having no idea what had
2 just happened. I couldn't remember a single sort of, you
3 know, and specific, you know, question, or whatever. It was
4 just something that I felt extremely drained, and I remember
5 telling a student friend of mine that I felt like, you know,
6 my brain had been sucked by aliens, or something like that.
7 Basically, I just felt like I had no focus left and I was
8 completely exhausted.

9 Q. Did you ultimately get your score for the exam?

10 A. Yes. Eventually, the score report came back.

11 Q. And what happened?

12 A. I received a passing score, but it was a very low passing
13 score that was actually within error bars of failing.

14 Q. If you turn to Exhibit 38, can you explain what this is?

15 A. This looks like my score report from Step 1.

16 Q. And it reflects that you passed?

17 A. Yes.

18 Q. What was your score?

19 A. 198.

20 Q. Is that a raw score or scaled score?

21 A. I think it's scaled.

22 Q. And what was the passing score?

23 A. At the time, it was set to 198. I believe it's been
24 increased since then.

25 Q. I'm sorry, your score was a 198. What was the passing

1 score?

2 A. Oh, I'm sorry. The passing score at the time was 192.

3 I'm sorry.

4 Q. And 192 is also a scaled score?

5 A. I believe so.

6 Q. After the Step 1 exam occurred, at some point in time,
7 did you have to take the Step 2 CK exam?

8 A. Yes.

9 Q. And when did you plan on taking that?

10 A. So students normally take the Step 2 CK exam during their
11 clinical rotation years, near the end of their third year or
12 beginning of their fourth year, so that they'll be able to
13 apply for residency, and they don't have to have a year off
14 after they finish their medical curriculum, they can just go
15 straight into residency.

16 Q. Did you do that?

17 A. So I applied for accommodation in 2015 while I was doing
18 rotations, and I received a denial letter from the NBME
19 stating they had denied my request for accommodation on the
20 Step 2 exams. And I was still doing rotations, so I knew that
21 I was going to have to have a dedicated study time for this
22 exam. And I continued rotations, and then I had dedicated
23 study time after.

24 Q. And what was taking place with respect to your status as
25 a student at AUC?

1 A. So when you finish rotations, and you don't have any
2 rotations left, my school's policy is that they will give you
3 three leaves of absence in a row, and if you don't take the
4 step exam within that time period, it's grounds for dismissal.

5 And so I prepared to try to take the exam, but I was on
6 those leaves of absence, and basically I requested for my
7 school to allow me to take it. At that time, I was also
8 taking a comp exam as part of my school's curriculum, and that
9 was a very long exam as well. It's actually the longest exam
10 that my school gives is that exam. And with the extended
11 time, I believe it was six hours straight, or something like
12 that that I had to sit for that exam. I can't remember.

13 And so the long duration of that exam and the grueling
14 nature of that exam made it very difficult for me to get the
15 score that my school wanted. And so my school didn't want me
16 to take the Step 2 CK exam until I had passed the comp.
17 Eventually, they allowed me to go ahead and take the CK exam,
18 because they said that if I didn't take the CX exam, they
19 would be dismissing me, and it would be because I had not
20 provided a passing Step 2 CK score within three leaves of
21 absence.

22 Q. The construct of the Step 2 CK, does it differ from the
23 Step 1?

24 A. The questions are different. There's more clinical
25 information that's more related to what you experience in the

1 hospital in the real world as a physician. And they also have
2 lab values, and things like that that, you have to integrate
3 together. Also, the focus is less on just diagnosis or
4 pathophysiology, like how do these process works, that's more
5 Step 1.

6 Step 2 is more about management and what the best next
7 step is, things like that, or managing a patient, or something
8 like that.

9 Q. And how many blocks are in the Step 2?

10 A. So the Step 2 CK exam is a longer exam than Step 1. I
11 believe it's eight blocks of questions and I think one hour of
12 break time total, so it's nine hours total, the testing day.

13 Q. And did you apply for accommodations for the USMLE Step 2
14 CK?

15 A. Yes.

16 Q. Can you go to Exhibit 39, please.

17 Is this a blank copy of the application?

18 A. Yes.

19 Q. Did you submit a completed copy?

20 A. Yes. It looks like the same type of application that we
21 did the previous year for this form.

22 Q. All right.

23 A. Yeah.

24 Q. And what accommodation were you requesting on the Step 2
25 CK the first time?

1 A. I believe that the accommodations we requested were
2 similar to our Step 1 request, and it included 50 percent
3 extended time and multiple day testing, a quiet testing
4 environment, I think also an audio version of the exam, et
5 cetera.

6 Q. Exhibit 40, can you explain what this is?

7 A. So this is a copy of the cover letter that I wrote, that
8 I submitted along with my application, where I explained about
9 how my disability affects me. And I tried to give some
10 updated information to the NBME since there had been some time
11 that had passed since their first denial.

12 Q. And this is a copy of your cover letter that you sent in
13 connection with your application for the Step 2 CK?

14 A. Yes.

15 Q. Exhibit 41, is this a document you submitted in
16 connection with your application for the request for
17 accommodations on the USMLE Step 2 CK?

18 A. Yes. This is a letter from my school verifying that I
19 continue to be given accommodation while at AUC, up through
20 the time that I was applying for accommodation in 2015, yes.

21 Q. And what accommodation was AUC providing?

22 A. Extended time and distraction-limited environment.

23 Q. Okay. Exhibit 42, did you provide Exhibit 42 to the NBME
24 in connection with your request for accommodations on the
25 USMLE Step 2 CK?

1 A. Yes. This is a summary sheet, it's called. My school
2 issues these periodically, where it shows different rotations
3 you're scheduled for, as well as your scores on those, et
4 cetera.

5 Q. All right. There's a section there that says "Core Test
6 Scheduling Results." What does that refer to?

7 A. Where is that?

8 Q. That's in the middle of the page.

9 A. Okay. So the core rotations are basically your third
10 year rotations that you do. And when you are at the end of
11 each of those rotations, you have a shelf exam that you have
12 to take to pass. There's evaluations that are given by your
13 preceptors, who are the people you worked with in the
14 hospital, about your performance working with patients and
15 your knowledge base, et cetera. And then there's also a
16 component that's based on the scores on the standardized
17 tests, and those things are put together to be the score you
18 get on that rotation.

19 Q. And the shelf exams that you referred to, are those the
20 NBME-type exams?

21 A. Yes.

22 Q. And you had accommodations on those exams?

23 A. Yes. Those are given in Prometric centers, and my school
24 was able to have accommodation for me on those.

25 Q. Did you pass all your shelf exams?

1 A. Yes.

2 Q. And is that reflected on Exhibit 42?

3 A. Yes. I mean, this is an incomplete summary sheet, but I
4 did pass them all, yes.

5 Q. All right. Subsequent to submitting this summary sheet,
6 you took more shelf exams?

7 A. Yes.

8 Q. How many shelf exams did you take in total?

9 A. So I believe there are six core rotations, and there's a
10 shelf exam at the end of each of the core rotations, so six.

11 Q. And on those six shelf exams, you received 50 percent
12 extended time?

13 A. Correct.

14 Q. Did you pass all those exams?

15 A. Yes.

16 Q. And how long are those shelf exams under standard
17 administration?

18 A. I believe maybe in the area of two hours. I'm not
19 certain exactly.

20 Q. So they're quite smaller than the Step 2 CK?

21 A. Yes.

22 Q. That's all the documentation that we went through that
23 you submitted to the USMLE -- to the NBME for the USMLE
24 Step 2 CK exam in 2015?

25 A. So all of these documents, but I believe there was also a

1 report from Dr. Beach from 2015 as well.

2 Q. And Dr. Farmer had indicated in her exhibits with her
3 declaration that your application, the first application for
4 USMLE Step 2 CK, was received on April 3rd, 2015. Does that
5 comport with your recollection?

6 A. Sounds correct.

7 Q. Did the NBME respond to your request for accommodations?

8 A. Yes.

9 Q. And what was their response?

10 A. Another denial.

11 Q. Exhibit 43. Is this a copy of the denial letter?

12 A. Yes.

13 Q. The letter is dated July 24, 2015. Does that comport
14 with your recollection as to when you received it?

15 A. Yes.

16 Q. That would suggest that the NBME took over 110 days to
17 respond to your request. Is that your recollection?

18 A. That sounds correct.

19 Q. Did you ultimately take the USMLE Step 2?

20 A. Yes.

21 Q. I'm sorry, the USMLE Step 2 CK?

22 A. Yes.

23 Q. When did you take that?

24 A. I believe it was in 2017.

25 Q. So roughly two years after you had submitted your

1 application for accommodations?

2 A. Yes.

3 Q. During that two-year period, did you study for the Step 2
4 CK?

5 A. Yes. I finished my rotations in, I think it was in
6 April of 2016, and so at that point, I was finished with all
7 of my course work, and I had time to study just for the step
8 exams, so I studied for Step 2 CS and Step 2 CK.

9 Q. About how many hours were you spending studying for the
10 Step 2 CK during those two years?

11 A. Many, many hours. It was similar to my preparation for
12 Step 1, where I would spend as many hours in a day as I could,
13 and it was my main focus.

14 Q. Can you describe your preparedness and knowledge base for
15 the Step 2 CK prior to taking it?

16 A. I felt prepared.

17 Q. Did you ultimately take the exam?

18 A. Yes.

19 Q. What strategy did you utilize when taking the exam?

20 A. So the first time I took the Step 2 CK exam I tried to do
21 a similar strategy as what I did during Step 1. Even though
22 it was very difficult, and I still had areas of study when I
23 couldn't finish, I had achieved a passing score and so, you
24 know, if I was able to do something similar on a Step 2 CK,
25 then maybe I could get a passing score as well.

1 So I was rushing through and, you know, trying to look
2 for key words, and basically marking things randomly so I
3 didn't leave anything blank on the exam when I was running out
4 of time at the end, and that was -- that happened every single
5 block, where I was basically running out of time and had
6 marked things randomly, and that was the approach that I used.

7 Q. Do you have an estimate of about how many questions on --
8 in terms of a percentage basis, how many questions you were
9 able to get through?

10 A. I mean, it's difficult to say because I -- I was rushing
11 so fast that I was basically trying to answer questions
12 without reading them. So I know that I had, you know, the
13 different questions, I had clicked through them, but as far as
14 questions that I actually understood and answered with
15 comprehension, very minimal, you know, maybe 10 to 20 percent
16 that I felt that I'd really understood what they were asking.

17 Q. And in terms of questions that you answered completely?

18 A. I answered all of the questions. I didn't leave anything
19 blank.

20 Q. So you're allowed to guess?

21 A. I just would guess randomly, yes.

22 Q. Do you feel that you were able to demonstrate your skill
23 and knowledge on the USMLE Step 2 CK exam that you took in
24 April 2017?

25 A. No.

1 Q. Exhibit 44, can you state what this is?

2 A. This is my score report on the Step 2 CK exam.

3 Q. And what was the result?

4 A. It was a failure.

5 Q. And what was your score?

6 A. I had a 151.

7 Q. And what was the passing score?

8 A. 209 was the passing score.

9 Q. Did there come a time that you went to take the Step 2 CK
10 a second time?

11 A. Yes.

12 Q. When about was that?

13 A. I believe that was in 2018. I can't remember exactly.

14 Q. So several years later?

15 A. Yeah, maybe a year or so later, yeah.

16 Q. During this period of time, roughly three years, what is
17 taking place with respect to your status as a student at AUC?

18 A. So I've finished all of my course work in 2016, in April,
19 and so the entire time from there on I am a student on leave
20 of absence. And according to my school's rules, if you are on
21 leave of absence for three leaves of absence in a row, and you
22 don't have a passing score on one of these exams, then you
23 are -- it's grounds for dismissal.

24 And after I received this first failing score on the Step
25 2 CK exam, my school dismissed me, and -- because I hadn't

1 provided a passing Step 2 CK score. And I had to go through
2 the appeals process of my school to be readmitted to my school
3 so that I could have another chance at taking the Step 2 CK
4 exam.

5 So normally what happens with students is they have three
6 leaves of absence. If they don't pass the exams, they get
7 dismissed. And then if they win their appeal, they are
8 readmitted for one more term. And then if they don't pass it
9 within that one term, then they're dismissed. So within four
10 terms after they finish their rotations, if they aren't
11 passing the exam, they're dismissed without right to appeal.

12 Q. And were you able to get some type of accommodation and
13 relief from your school from that rule?

14 A. I engaged a lawyer named Phyllis Brown. And she was able
15 to work with my school, and they agreed to give me a year
16 extension to submit another application for accommodation with
17 the NBME to request accommodation on the Step 2 CK exam.

18 Q. Did you submit another application to the NBME for
19 accommodations?

20 A. Yes.

21 Q. And if we can go to Exhibit 45.

22 Is this the copy of the application requesting
23 accommodations?

24 A. Yes.

25 Q. And this is for the second time you attempted the Step 2

1 CK?

2 A. Yes.

3 Q. If you go to page PX386.

4 What accommodation were you requesting?

5 A. So again, we requested a similar profile of
6 accommodation, but the difference this time is that we
7 requested 100 percent extra time instead of 50 percent extra
8 time.

9 Q. Why 100 percent?

10 A. So when I had taken the Step 2 CK exam, it was obvious to
11 me that due to the increased complexity of the exam, and the
12 way in which I had to integrate the information together, and
13 the reading demands, that I was able to comprehend so little
14 of the test there's no way that I was going to be able to
15 finish the exam and adequately show my knowledge with 50
16 percent extra time.

17 And so when Dr. Beach evaluated me, as part of the report
18 that was submitted with this, the testing that she did, she
19 felt that it did justify a hundred percent extended time and
20 that was part of this request form.

21 Q. Okay. And if you turn to page 387, at the bottom.
22 Regarding your standardized test accommodations history,
23 there's an indication there for shelf exam 2014, 2016?

24 A. Yes.

25 Q. Are those the exams that we had discussed earlier in your

1 testimony that are provided during your clinical rotations?

2 A. Yes. This would be the core shelf exams.

3 Q. And this is an updated piece of information that you
4 provided to the NBME from earlier requests?

5 A. Yes.

6 Q. And Exhibit 46, did you provide this to the NBME?

7 A. Yes.

8 Q. All right. And that's from AUC, the accommodations you
9 were receiving from them?

10 A. Yes, that's correct.

11 Q. And Exhibit 47.

12 Is this a copy of a cover letter?

13 A. Yes.

14 Q. And what's the purpose of this cover letter?

15 A. So since this was my third submission requesting
16 accommodation with the NBME, I updated my cover letter and
17 included information to try to give them an update on what had
18 been going on since my student status had progressed, et
19 cetera, and basically just I was trying to describe how my
20 disability affects me, as well as what my experience was
21 during the exams that I took with the NBME that the NBME had
22 denied me accommodations for, and what the experience was when
23 I took those under standard conditions.

24 Q. And Exhibit 48, this is a letter from Phyllis Brown?

25 A. I believe so, yes.

1 Q. Is this a document you submitted to the NBME with your
2 request for accommodations?

3 A. Yes.

4 Q. And Exhibit 49, is that a document that you submitted to
5 the NBME in connection with your request for accommodations?

6 A. Yes.

7 Q. And what is this?

8 A. This is the evaluation write-up that Dr. Beach did, I
9 believe.

10 Q. Okay. And this is a document you provided in connection
11 with your request for accommodations?

12 A. Yes.

13 Q. And I apologize to have to do this, but back at
14 Exhibit 8, can you state what this document is?

15 A. This is the report update that Dr. Beach wrote. I think
16 the other one was maybe a cover letter or something. I don't
17 remember exactly what the other one included, but that was
18 also from Dr. Beach, but this is her evaluation.

19 Q. And this is an evaluation that Dr. Beach had performed on
20 you in July of 2017?

21 A. Yes.

22 Q. And is that the third evaluation that Dr. Beach
23 conducted?

24 A. Yes, I believe so. Yeah. Actually, that might have been
25 her fourth. I can't remember, because I think 2010, 2013

1 2015, 2017, so four.

2 Q. And I believe that the documents that NBME filed with
3 this court reflects that your request was received on March 2,
4 2018. Does that comport with your recollection?

5 A. That sounds right.

6 Q. Did the NBME respond to your request?

7 A. Yes.

8 Q. What was their response?

9 A. It was another denial.

10 Q. And Exhibit 50?

11 A. Five zero?

12 Q. Five zero, yes.

13 Is this a copy of the denial letter that you received?

14 A. Yes.

15 Q. And it's dated May 27, 2018?

16 A. Yes.

17 Q. And that would appear that it took them over 80 days to
18 respond to your request for accommodations?

19 A. Sounds right.

20 Q. Did you take the USMLE Step 2 CK a second time?

21 A. Yes.

22 Q. Can you describe your study efforts?

23 A. Yes. So at this point, I knew that I was on thin ice
24 with my school. They had already dismissed me, and I had
25 appealed and been readmitted. I submitted another request for

1 accommodation and had been denied. I knew that this was going
2 to be my last chance, basically, at this exam. That's what it
3 felt like. And so I was extremely intense with my studying,
4 as before. I had done a review course and spent many, many
5 hours, as before, a long time, months, you know, I don't know,
6 years, depending. It feels like it had been going on for so
7 long. And anyway, so I just -- I did everything that I could
8 to prepare for this exam.

9 And I also worked with a testing advisor specifically to
10 try to see if there was anything I could do to increase the
11 speed at which I processed through questions. And it was
12 someone who specialized in working with people with learning
13 disabilities and had working memory limitations like ADHD and
14 dyslexia, both. And so we worked together on that and tried
15 to see if there were ways I could speed up my processing of
16 questions.

17 There were certain things that I was able to sort of
18 change how I processed that seemed helpful and could improve
19 my accuracy, but as far as actually increasing the speed to a
20 point where I could get through it under standard conditions,
21 it wasn't possible. And so my strategy, after working with
22 that person, was to basically try to go for accuracy instead.

23 And so instead, I was going to go as quickly as I could,
24 but I was going to actually give myself a chance to read the
25 questions for like the first time ever on these exams. And I

1 was going to read the questions, and at the beginning of each
2 block, I was going to mark the entire second half of the
3 block, just like I think it was either C or D that I'd picked.
4 I picked one letter and I used it all that entire test day.

5 And I just know I wasn't going to have time to get
6 through the entire block, so I marked the same letter for the
7 whole second half of the block during the first however many
8 seconds of each block, and then I went back to the beginning,
9 and then I started working through the block, reading as
10 quickly as I could with comprehension to get through the
11 questions.

12 And when I did that, I felt that the experience on the
13 exam was totally different. I was actually able to understand
14 what the questions were asking. I was able to actually answer
15 the questions without just feeling like I was completely
16 marking things randomly, which is what I had experienced in
17 the past.

18 And so I ended up going through, and when I actually took
19 the exam, my estimate is that I got through about maybe 60
20 percent of the questions using this approach, where I was
21 going as fast as I possibly could and using every single
22 strategy I could. If I had to skip questions because I had
23 identified that those questions were questions that would take
24 too much time, et cetera, I would do that.

25 But even with that, I would still get through about maybe

1 60 percent, maybe, of the questions, and then the remainder of
2 them were just marked from the beginning. And because I had
3 marked them at the beginning of each block, I could work to
4 the very last second without having to split my attention
5 between reading the questions and watching the clock as I
6 counted down, and worrying about having half the block blank
7 and empty.

8 Q. Okay. And you indicated that those questions that you
9 had filled in the blanks, it was one letter?

10 A. Yes.

11 Q. Did you ultimately receive a score for your exam?

12 A. Yes.

13 Q. If you would turn to Exhibit 51, please.

14 Is this a copy of your score report?

15 A. Yes.

16 Q. And what occurred?

17 A. I failed the exam again.

18 Q. What was your score?

19 A. 166.

20 Q. That was an improvement from your prior attempt?

21 A. Yes.

22 Q. And what was the passing score?

23 A. I believe it was still 209.

24 Q. Now, this USMLE Step 2 CK, do you have an understanding
25 of how many people pass this exam in terms of a percentage?

1 A. So all of medical students are required to take this exam
2 if they want to practice in the United States. If you're from
3 another country, and you already have an MD from abroad, you
4 also have to take the USMLE exam to be licensed in the United
5 States. But I would assume that a high percentage passed. I
6 think it's somewhere in the 90 percent. It depends if it's a
7 U.S. school or international school what the percentage would
8 be.

9 Q. Have you ever looked online at the USMLE website to see
10 what the passing rate is?

11 A. Yes.

12 Q. I'm going to direct you to Exhibit 57.

13 Is this a copy of the performance data from the USMLE
14 that you reviewed regarding the results of the passing rates
15 for the Step 2 CK?

16 A. Yes, it appears to be.

17 Q. And what is the passing rates that they publish?

18 A. So for the first time test takers, it's 96 percent.

19 Q. Are you aware of what the passing rates are for
20 individuals out of AUC?

21 A. I believe it's a little bit lower than U.S. graduates,
22 but it's also in the 90 percent something, 90 percent
23 something.

24 Q. All right. And if you look at Exhibit 58, on PX440, are
25 these the passing rates that you reviewed from AUC?

1 A. Yes.

2 Q. And what do they indicate?

3 A. The Step 2 CK first time pass rates for AUC students is a
4 92.8 percent.

5 Q. After your results were published for the second attempt
6 on the Step 2 CK, did you receive any communication from the
7 USMLE program?

8 A. Yes.

9 Q. If you turn to Exhibit 52, can you explain what this is?

10 A. This is a letter I received from the USMLE stating that
11 my performance on the second CK attempt was being flagged as
12 anomalous performance.

13 Q. And what was the impact of that? Were you able to take
14 the Step 2 again?

15 A. So this letter informed me that I was having a hold put
16 on my account, and I was not allowed to schedule any further
17 Step 2 CK exams until it had been evaluated and resolved.

18 Q. And how did you respond to that?

19 A. So when I received this, I think there was a deadline
20 where I had to give some sort of a response. I was shocked to
21 have received this because I had already requested
22 accommodations so many times, and one of the things that the
23 letter was saying is that I had marked the same letter for
24 44 percent of the exam. And so I knew that to respond to this
25 without legal counsel was not a good idea, and that's when I

1 engaged you to help me with the response.

2 Q. Okay. Do you agree with the statement in the letter
3 which says, "During this test administration, you selected one
4 letter option more than 44 percent of the time"?

5 A. Yes.

6 Q. And if you turn to Exhibit 53.

7 Is this, in part, your response to USMLE and their prior
8 letter in Exhibit 52?

9 A. Yes.

10 Q. And what were you trying to convey to the USMLE in this
11 declaration?

12 A. So I wanted to explain, you know, sort of a summary,
13 because it seemed like in the letter, the person who wrote
14 that letter didn't understand that I had already applied for
15 accommodation, et cetera. And since they were accusing me of
16 anomalous performance, I thought that I should explain not
17 only my disability status and my experience during the exam,
18 but actually the, you know, sort of the context that went into
19 that.

20 And the fact that it was actually a testing taking
21 strategy, where I was trying to optimize my performance to get
22 the highest score possible given the limited amount of time
23 that I had since I had been denied accommodation, and so it
24 wasn't anomalous, it was on purpose. I was trying to maximize
25 my score. I wasn't trying to lower my score.

1 Q. Did you advise the USMLE as well in this declaration
2 about your preparedness for this exam?

3 A. I believe so, yes.

4 Q. And in response to submitting this submission to the
5 USMLE, did they respond to you?

6 A. The response was that the flag was being removed from my
7 account.

8 Q. And if you turn to page 264, is this a copy of the
9 response? I'm sorry, 54.

10 A. Yes, it looks like, yes.

11 Q. And so after that, you were clear to be able to take the
12 USMLE Step 2 CK a third time?

13 A. Yes.

14 Q. What was taking place at this point with respect to your
15 status as a student with AUC?

16 A. So when I received the score report the second time that
17 I took the CK exam, shortly after that I had received a letter
18 about the anomalous test taking and that my account had been
19 flagged because of answering the same letter. And I think it
20 was either the same day or a couple days later, I also
21 received notification from my school that because I had not
22 provided a passing CK score, they were dismissing me again,
23 without right to appeal, and that the dismissal would be
24 basically forthcoming, and I could expect the paperwork
25 dismissing me for good with no ability to appeal.

1 Q. Does your school also have a requirement in terms of how
2 long it should take you to graduate?

3 A. Yes.

4 Q. And what is that requirement?

5 A. So students are required in the student handbook to have
6 completed all of their course work within seven years total.

7 Q. If you turn to Exhibit 59.

8 And pages PX444 through 446, does this contain the
9 requirement that you must graduate within seven calendar
10 years?

11 A. Yes.

12 Q. And what is the impact of not completing the program
13 within seven calendar years?

14 A. They will dismiss the student.

15 Q. In terms of addressing the problems with your med school,
16 what did you do?

17 A. So I informed them about the situation, that I had
18 received the letter from USMLE about the testing flag and that
19 I had to give a response and asked them to hold any dismissal.
20 I had a conversation with a member of AUC faculty or staff,
21 and she said that unfortunately, because the handbook requires
22 that the student will be dismissed, that's, you know,
23 unfortunate that I'm in this situation, but they are going to
24 go ahead and dismiss me anyway, and I'll be issued the
25 paperwork any day.

1 So I was already working with you to respond to the
2 letter. And I believe I reached out to you to draft a
3 response so that we could try to get my school to not dismiss
4 me and extend my student status.

5 Q. And at Exhibit 60 -- first of all, what is Adtalem?

6 A. So my school is American University of the Caribbean, and
7 Adtalem is like an umbrella organization that is over that.
8 There are a few different schools that are all owned, I guess,
9 by Adtalem. And when there's an issue where it needs
10 arbitration, or ombud has to get involved, they transferred it
11 basically to Adtalem.

12 Also, this was happening, I believe, around the same time
13 that there was a hurricane hitting St. Maarten's, so I don't
14 know if that was also an administrative thing, where their
15 offices was not working because of the hurricane, I'm not
16 certain. But this is the umbrella organization above my
17 school.

18 Q. Did you receive a copy of this letter from Adtalem's
19 attorney?

20 A. Yes.

21 Q. And what is your understanding of what's required from
22 you from AUC?

23 A. So they stated that I had to start legal proceedings
24 within 45 days in order to maintain my student status,
25 otherwise I would have immediate dismissal from my school, and

1 that they would give leaves of absence so that I could pursue
2 this in the legal system was my understanding.

3 Q. Okay. This Complaint, this lawsuit, was filed at the
4 beginning of the year. Why are you requesting the preliminary
5 injunction now?

6 A. So when we initially submitted the Complaint, I was
7 hopeful -- since your interactions with NBME, it sounded like
8 they were sending out my information for review by an
9 independent reviewer. And I was hopeful that an independent
10 reviewer looking at the case would be able to see the merits
11 of what we had submitted.

12 And it was multiple months before the August timeline to
13 take the -- to have the CK exam taken in order to stay on
14 track with the residency timeline. And so it -- I was hoping,
15 I guess, that the actual preliminary injunction would not be
16 necessary since there were multiple months to go.

17 But then as things got closer and closer to the August
18 deadline, and then the courts had given dates of May -- I
19 think it was May of 2020 to have the trial, it was clear to me
20 that I wouldn't be able to move forward with my career
21 progression. And by not moving forward with residency, I
22 wouldn't be able to move on with my career path, even though I
23 had already been on thin ice and basically dismissed and
24 readmitted from my school, and all of this was pending a
25 decision relating this. And despite all of these submissions

1 to the NBME, the actual decisions were never changing, and the
2 reasons given were not things that matched up with my
3 experience, so --

4 Q. When do you have to take this exam by?

5 A. So my school advised the students to take the exam in
6 August, by the end of August, so that they could have the
7 scores back for the beginning of when interviews go out in
8 October.

9 The way that the cycle works, you have interview season,
10 which is basically October, November, December, and then
11 that's done. And if you haven't interviewed, then you can't
12 rank schools, you can't rank programs that you haven't
13 interviewed at. And then the match happens, I think it's in
14 March, where they release the decision. But the students that
15 match or don't match, that's a decision for what happens in --
16 July 1st is when they would start residency.

17 So if I can't stay on cycle this time, then basically it
18 would be pushing when I would start residency. Instead of it
19 being July of 2020, it would be July of 2021, so that's my
20 understanding.

21 Q. Can you describe the match and the match process?

22 A. So there's a centralized application. On your
23 application, it includes a letter from your school that
24 includes your grades, as well as you have letters of
25 recommendations from the attendings and different people that

1 you work with explaining your clinical skills as they've
2 observed them.

3 And then once the programs review that, then they will
4 send out invites, and they'll invite you to come and interview
5 you at their program if they're interested. And it's
6 something that if you don't interview, then you can't rank a
7 program. It's -- that's how it works.

8 But there is something that Mr. Burgoyne mentioned, it's
9 called the SOAP, that can come at the end, or it's also called
10 the scramble. Basically, if you go through that process and
11 you don't match, then you can be put on a list for programs
12 that might still have spots. And if you're lucky, then they
13 might contact you and you can try to match into a spot at the
14 last minute, but it's something that the students from my
15 school that I know who have gone through it have not had luck
16 with that, so --

17 Q. Is there anything about your particular application that
18 is unique, that mandates or requires you to be able to take
19 the exam when you are requesting to take the exam in this
20 preliminary injunction?

21 A. Yes. I think that an expectation of having program
22 directors looking at my application and seeing two extremely
23 low failing CK scores, to expect them to want to interview me,
24 and look at me, and not actually have any idea if I'm going to
25 be able to pass the exam, it's extremely unlikely.

1 And what that effectively means is if I'm not able to
2 take this exam and show that I can pass the exam, then, you
3 know, either I get no accommodation, I'm dismissed by my
4 school without right to appeal, or I have a passing score on
5 the exam, then I might actually have a chance to have
6 interview invites. But if I don't have that to submit an
7 application, and my application is not complete with a CK
8 score, there's no way that any program director is going to
9 look at me as a serious applicant.

10 Q. If you don't take the exam now with accommodation, what
11 impact does that have?

12 A. I'll have immediate -- well, so if I don't take it with
13 accommodation, I most likely will fail, given that I've
14 already failed it twice before, and I won't have a chance to
15 read the questions and understand the exam. And that will
16 lead to a failure on the Step 2 CK a third time, and that will
17 result in immediate dismissal from my school and the end of my
18 medical career.

19 Q. Why couldn't you then just try and take the USMLE Step 2
20 CK a fourth time?

21 A. My school would not allow that.

22 Q. All right. Is it a requirement with the NBME to be an
23 active student to take the USMLE Step 2 CK?

24 A. Yes.

25 Q. Is there any other prerequisite to taking the Step 2 CK?

1 A. You already have to have an MD degree, or you have to be
2 an active student to take the Step 2 CK exam.

3 Q. So if you were dismissed from AUC, you will neither be an
4 active student nor will you be an MD?

5 A. Correct.

6 Q. How would extra time help you on the USMLE Step 2 CK?

7 A. So it would give me the ability to read and comprehend
8 the questions and show the knowledge base that I have amassed.
9 When I have been evaluated through other evaluations during my
10 time as a student, I've had good scores on my evaluations from
11 preceptors, who have observed me and seen me with patients and
12 seen how I interact. And I've also passed all of my scores
13 with accommodation when I've had accommodation.

14 So it's something that if I don't have that, I will not
15 be able to pass and I will not be able to continue onwards.
16 It's, you know, something that will greatly affect my life.
17 I'm under a lot of pressure because of the fact that I, you
18 know, have been unable to work because I'm constantly studying
19 for this exam for years now, and I never know when the exam is
20 going to come, because at any moment the decision could be
21 made that my scheduling permit becomes active, and I have to
22 be ready to sit for the exam. So until a decision is made one
23 way or another, I can't move on with work personally or my
24 career development.

25 MR. WEINER: Thank you. Your Honor, I have no

1 further questions on direct.

2 THE COURT: Okay. I think now would be a good time
3 for a lunch break. If we take an hour and 15 minutes, does
4 that give folks enough time to run out, grab something?

5 MR. BURGOYNE: Sure.

6 THE COURT: Okay. So let's plan on -- it's about ten
7 after. Let's plan on 1:30 to resume.

8 (Lunch recess.)

9 THE COURT: Mr. Burgoyne, you may proceed.

10 MR. BURGOYNE: Thank you, Your Honor.

11 CROSS-EXAMINATION

12 BY MR. BURGOYNE:

13 Q. Good afternoon, Brendan. Bob Burgoyne, again, for the
14 National Board of Medical Examiners. Let me ask a couple of
15 quick follow-up questions from this morning.

16 Your mother testified that you don't understand French;
17 is that correct?

18 A. Yes.

19 Q. And you do not speak French; is that correct?

20 A. That's correct.

21 Q. Do you understand French?

22 A. Depends on what it is. I understand some words.

23 Q. Is it limited?

24 A. Yes.

25 Q. And are your sisters both fluent in French?

1 A. Yes.

2 Q. And would you say you grew up in a bilingual home?

3 A. Both of my parents speak two languages, yes.

4 Q. You also mentioned that you are, I believe, fluent in
5 Japanese?

6 A. Yes.

7 Q. And you've learned Japanese while you were a sophomore in
8 college?

9 A. That's correct.

10 Q. And you became fluent while there on that program?

11 A. That's correct.

12 Q. Did you, at some point, start tutoring students in
13 French -- or Japanese and biology?

14 A. Yes.

15 Q. And that was while you were in Japan?

16 A. That was after I came back to the United States. That
17 was at the University of Cincinnati.

18 Q. You testified you attended first grade in a public
19 elementary school, and then you were home schooled for second,
20 third, and fourth grades, correct?

21 A. Yes.

22 Q. And then in fifth grade, you went to St. Gabriel
23 Consolidated School?

24 A. Yes.

25 Q. And you attended that from fifth through the eighth

1 grade?

2 A. Yes.

3 Q. And you didn't have any individual education program, an
4 IEP, or anything like that, that provided for formal
5 accommodations at St. Gabriel?

6 A. The accommodations I received were informally given.

7 Q. Take a look, if you would, please, PX1. It's the
8 plaintiff's exhibit book.

9 A. Is that the same as Number 1?

10 Q. Yes. Do you recall testifying this morning about this
11 letter?

12 A. Yes.

13 Q. And who is Mary Lou Huth?

14 A. She was my teacher at St. Gabriel school.

15 Q. What subject did she teach?

16 A. She taught all the subjects.

17 Q. What subject did she teach you?

18 A. She was a fifth grade teacher. She taught all the
19 different subjects, so English, writing, math, science.

20 Q. So you only had one teacher for all of fifth grade?

21 A. For all of -- yes, that's correct.

22 Q. And this letter is dated May 28th, 2010, and that was
23 shortly after you first went to see Dr. Beach; is that
24 correct?

25 A. This letter?

1 Q. Yes.

2 A. This is 2009, it says. Is that --

3 Q. The version I have says 2010.

4 THE COURT: I think he's looking at the defendant's
5 exhibit.

6 THE WITNESS: Sorry. Am I looking at the wrong
7 thing?

8 THE COURT: Yes.

9 THE WITNESS: Sorry. Okay.

10 Q. I know it's a lot to deal with.

11 A. Okay. Here we go.

12 Q. You see this letter is dated May 28, 2010?

13 A. Yes.

14 Q. And that was shortly after you first went to see
15 Dr. Beach for the first time?

16 A. It's possible, yes.

17 Q. And who requested this letter from Ms. Huth?

18 A. I did.

19 Q. And did you talk to her about the content of the letter?

20 A. I explained to her that I was preparing to submit an
21 application for accommodation, yes.

22 Q. And who drafted the letter?

23 A. She did.

24 Q. And did you obtain the signature from her on that letter?
25 Did you ask for a signed version of the letter?

1 A. She prepared it and gave it to me like this.

2 Q. So the only version you've ever seen is this signed
3 version of the letter?

4 A. As far as I know, yes.

5 Q. Take a look, if you would, at the other notebook now. My
6 apologies for making this -- the notebook of our exhibits.

7 THE COURT: We're all going to get really strong by
8 lifting.

9 MR. BURGOYNE: We are, Your Honor. And I apologize
10 for that. It was no treat bringing them out here.

11 Q. And if you would, look at Tab 6 in this document.

12 A. (Complies with request.)

13 Q. Do you see this is the identical letter?

14 A. Okay.

15 Q. And there's no letterhead?

16 A. Okay.

17 Q. You'll agree with that, there's no signature on this
18 letter?

19 A. I see that.

20 Q. And I'll represent to you the letters at the bottom we
21 put on here to reflect the fact that this is the document we
22 obtained from Dr. Beach.

23 A. Okay.

24 Q. Do you know why Dr. Beach has an unexecuted version of
25 this letter in her files?

1 A. I'm assuming that it was sent as a draft. I'm not sure.

2 Q. Did you ever discuss this version of the letter with
3 Dr. Beach?

4 A. I may have. I don't remember.

5 Q. And if you look at the -- what did you tell Ms. Huth you
6 wanted in terms of the contents of her letter? What did you
7 want her to address in her letter?

8 A. I believe that I explained that we were applying for
9 accommodation, and that in the denial letter from the MCAT
10 review, I guess they were questioning whether I had had
11 accommodation earlier in life, so I would assume that I asked
12 her to write down what the accommodations were that I had when
13 I was at their school.

14 Q. And to your knowledge, does she have any background in
15 psychiatry or psychology?

16 A. I'm not certain what her background is.

17 Q. If you look at the second full paragraph here in this
18 letter, you'll see she starts out saying you were a student in
19 her fifth grade classroom?

20 A. Uh-huh.

21 Q. And then do you see that she goes on in this letter to
22 address the accommodations in her classroom when you were at
23 St. Gabriel, as opposed to the accommodations that you
24 received from fifth grade through eighth grade at St. Gabriel?

25 A. Where is that located?

1 Q. She starts out saying, "Brendan Berger was a student in
2 my fifth grade classroom"?

3 A. Okay.

4 Q. And then she goes on, in the third paragraph, she says,
5 "Because St. Gabriel Consolidated is a parochial school and an
6 IEP was not required for Brendan at the time, Brendan was
7 informally accommodated in my classroom."

8 So she didn't address in this letter accommodations you
9 got at any other point when you were at St. Gabriel, did she?

10 A. My accommodations were the same during my time at
11 St. Gabriel, so this would have been representative of that.

12 Q. Okay. But this is the only documentary evidence, other
13 than your testimony, that addresses accommodations that you
14 received when you were at St. Gabriel?

15 A. I believe so.

16 Q. Take a look at -- let's look at your version. Let's look
17 at Plaintiff's Exhibit 2. It's the letter from Moeller,
18 Archbishop Moeller.

19 A. Is that the other?

20 THE COURT: Yes.

21 Q. Do you recall discussing this letter this morning?

22 A. Yes.

23 Q. And is this the letter you relied upon as setting forth
24 the accommodations you received at Archbishop Moeller?

25 A. Yes.

1 Q. And I believe you read this letter this morning. It said
2 that it was an accurate description of your accommodation
3 history at Archbishop Moeller?

4 A. Yes.

5 Q. Tell me if this part of the letter is accurate. It says
6 in the second paragraph, "Upon entering Moeller High School,
7 Brendan continued to use audio books that he acquired on his
8 own, and to apply acquired strategies to deal with his
9 disability without direct support from the Moeller support
10 team." Is that an accurate statement?

11 A. Yes.

12 Q. And then, However, during your junior year at Moeller,
13 you experienced difficulty with timed tests, especially those
14 with extended reading and writing requirements. Given this
15 past history, a referral was made to determine your level of
16 functioning, and you were referred to Dr. Smith in
17 January 2003 --

18 A. Yes.

19 Q. -- is that correct. And then it says in the next
20 paragraph, "Given the results of the evaluation, a Moeller
21 Assistance Plan was developed to provide accommodations to
22 address Brendan's needs." Do you see that?

23 A. Yes.

24 Q. And so it was from that point forward that you were
25 approved to test, and that those accommodations consisted of

1 extended time, separate area, and you were permitted to
2 purchase your own copies of texts and audio books?

3 A. This is when that was formalized, yes.

4 Q. So according to this letter, it was after you got your
5 evaluation by Dr. Smith that you were provided with extended
6 testing time at Moeller?

7 A. No.

8 Q. That's not how you understand this letter, or that's not
9 what happened?

10 A. It was informally accommodated before, and the teachers
11 gave me extended time, even though it wasn't formalized in the
12 Moeller system's plan at the beginning of my time at Moeller.

13 Q. Why have a Moeller Assistance Plan if you could just get
14 accommodations without that, and why did you need to go to
15 see Dr. Smith to get an evaluation if you were already getting
16 the accommodations you needed?

17 A. I can't explain why their policies are the way they are.
18 I'm not certain.

19 Q. Jane Kagy, am I pronouncing that correctly?

20 A. I think it's Kagy.

21 Q. And you mentioned her earlier, and she was the case
22 manager for students with disabilities?

23 A. Yes.

24 Q. And then there's also a mention in her letter of a
25 Moeller Assistance Plan. Is that an official document like an

1 IEP or something?

2 A. I would assume it's similar.

3 Q. Okay. Did you ever see a copy of that? Did you receive
4 a copy of that?

5 A. Yes.

6 Q. And I take it it's not a document you still have?

7 A. No. I've looked. I can't find a copy of it.

8 Q. Where did this letter come from in order to provide it to
9 the Association of American Medical Colleges?

10 A. The letter by Jane Kagy?

11 Q. Yes.

12 A. She prepared it and she gave it to me.

13 Q. This is dated March 2007, which is several years before
14 you sought MCAT accommodations, and it looks like this one was
15 used to obtain audio books at the University of Cincinnati?

16 A. I submitted this to the DSO at the University of
17 Cincinnati, correct.

18 Q. And when it came time for you to submit this to the
19 Association of American Medical Colleges in 2009 and 2010,
20 where did you get this letter? Did you have a copy of it at
21 your house or something? How did you get a copy of this
22 letter to share with the AAMC?

23 A. I believe I still had a copy.

24 Q. Take a look, if you would, at Defendant's Exhibit 14.

25 And this, while you're looking for that, is a series of

1 email communications that were produced to us by Dr. Beach in
2 response to a subpoena we served in this case.

3 And look, if you would, I just put Bates numbers for
4 purposes of our use today. If you look on the bottom right,
5 there's some numbers. If you'll go to the page that's 0007.

6 And this is an email from you October 2013, and you're
7 sending an email to Dr. Beach. Do you recognize that?

8 A. At the top here?

9 Q. Yes.

10 A. Okay.

11 Q. And then in here, you're discussing the Jane Kagy letter
12 that we just looked at, correct?

13 A. I believe so.

14 Q. And you say here, "I was able to get Jane Kagy's letter
15 put on letterhead, which meant delaying a day before
16 everything went out." If you already had a copy of the letter
17 in your files, why were you putting a letter on letterhead
18 before it went out, and how were you able to do that?

19 A. All I can remember is I know that Jane Kagy had retired,
20 so I do remember going to my school, and it's possible I might
21 have asked them if they could print it on letterhead from the
22 school since she had produced it while she was still working
23 at the school, but I don't remember exactly how that happened,
24 if it was a staff member that printed it, or something like
25 that.

1 Q. In all events, the version of the document that went to
2 AAMC in 2010 wasn't whatever version you had in your files?

3 A. There's no text that was changed, or anything like that,
4 if that's what you mean.

5 Q. Let's talk briefly about your situation at the American
6 University of the Caribbean. You enrolled there in May 2011,
7 correct?

8 A. I believe so, yes.

9 Q. And you testified, I think, that you finished all of your
10 course work and all of your clinical rotations in 2016?

11 A. April of 2016.

12 Q. And then I think you also testified that from that date
13 forward, the only thing standing in the way of you graduating
14 was passing Step 2 CK?

15 A. The Step 2 exams. The Step 2 CS and the Step 2 CK.

16 Q. Okay. Other than that, there was nothing else you had to
17 complete?

18 A. My school wanted me to take the comp before they wanted
19 me to take the CK, but it's not required for graduation that
20 you have passing comp.

21 Q. Did you ever -- because I know I saw communication saying
22 you still hadn't taken that as of October 2018. Did you ever
23 end up being required to take that?

24 A. What that are you referring to?

25 Q. Your comprehensive clinical sciences.

1 A. I did take it.

2 Q. And when did you take that?

3 A. I took it on multiple occasions. I don't remember the
4 exact dates, but it would have been at the end of my clinical
5 rotations and then continuing after that.

6 Q. So you took it, but you didn't pass it?

7 A. Correct.

8 Q. And did you have accommodations on that exam?

9 A. I had 50 percent extra time on that exam.

10 Q. And have you ever passed that exam?

11 A. No.

12 Q. And is it your testimony it is not a graduation
13 requirement to pass that exam?

14 A. My school said that they're not requiring it of me.

15 Q. Not requiring it of you? Have they waived the
16 requirement for you?

17 A. I believe so.

18 Q. But for other students, it's a requirement?

19 A. I know other students who graduated without it, but I'm
20 not certain if their policies want other students to pass it.
21 I can't remember offhand.

22 Q. Why did the school want you to take that exam before you
23 take the Step 2 CK exam?

24 A. My understanding is that my school uses it as a quality
25 assurance measure. They would prefer to have students obtain

1 a high score on the comp exam before taking the step exam so
2 that the step exam, the first time pass rate is as high as
3 possible.

4 Q. Okay. So earlier you talked about the first time pass
5 rate at AUC, and you said it was around 90 percent. That
6 reflected, in part, the school's efforts to make sure people
7 were as prepared as possible before they first took the Step 2
8 CK exam?

9 A. Yes.

10 Q. You testified that you've been placed on academic
11 dismissal at least twice; is that correct?

12 A. I was dismissed once. I don't know what my current
13 status would be, if they would count it as dismissal or not.
14 I mean, I'm an active student, if that's what you mean.

15 Q. Were you dismissed after the first failure of the Step 2
16 CK exam?

17 A. Yes.

18 Q. And then you appealed that?

19 A. Correct.

20 Q. All right. And then were you dismissed again after the
21 second failure of the Step 2 CK?

22 A. My school said they wanted to dismiss me, and they were
23 planning to do so, but then that was when Mr. Weiner was able
24 to negotiate with them and it was not dismissed.

25 Q. And your counsel got involved at that point?

1 A. Yes.

2 Q. Do you know whether you're currently enrolled and in good
3 standing at AUC?

4 A. That's my understanding.

5 Q. Look if you would, please, at DX21, since that's the one
6 you have opened, and it's Exhibit A to that. So go to 21, and
7 then go to the tab that says Exhibit A or A.

8 You recognize this letter as one you testified about
9 earlier today?

10 A. Yes.

11 Q. And this is the letter from an attorney for, I believe
12 it's the parent company that owns the American University of
13 the Caribbean?

14 A. Yes.

15 Q. And in the second paragraph, she says, "If the suit is
16 successful and Mr. Berger is able to take the USMLE Step 2 CK
17 with accommodations, AUC will allow Mr. Berger to keep his
18 current academic status at AUC for one additional attempted
19 USMLE Step 2 CK."

20 The letter doesn't impose any deadline by which you have
21 to take Step 2 CK. Is there any communication from the school
22 that puts a deadline on you by which you have to take Step 2
23 CK?

24 A. No.

25 Q. So if at the end of this lawsuit, and after we've had

1 discovery and everything else, if the lawsuit is still going
2 on and you win at that point, the school is going to let you
3 take Step 2 CK at that time?

4 A. I would presume.

5 Q. Do you know if there are any other written communications
6 from the school regarding your status subsequent to that
7 December 2018 letter?

8 A. Not to me, not to my knowledge.

9 Q. And to just wrap things out now. Are you currently
10 taking classes at New England University?

11 A. I'm not.

12 Q. Did you complete those classes?

13 A. I did part of it, and then I decided to stop.

14 Q. Let's review your standardized testing history a little
15 bit. I don't think we had a complete history. We got into a
16 lot of it. My apologies. This is working out badly. Would
17 you please look at the other notebook for me.

18 MR. BURGOYNE: And I apologize to you as well, Your
19 Honor. Mr. Weiner and I attempted to avoid duplication as
20 best we could but didn't always succeed.

21 Q. Okay. Are you all set?

22 You testified earlier that you took some tests known as
23 the Stanford Achievement Test?

24 A. Yes.

25 Q. And you took those in the second, third, and fourth

1 grades. And those are among the documents that you sent to
2 the National Board of Medical Examiners, correct?

3 A. Yes.

4 Q. And you were being home schooled those years?

5 A. Yes.

6 Q. And do you recall taking those specific tests?

7 A. Not very clearly.

8 Q. It's a long time ago, I realize. Any recollection you
9 have about taking the test?

10 A. I remember going for standardized tests during home
11 schooling once a year, so I'm assuming it might be those
12 exams, but I'm not certain.

13 Q. And that was going to be exactly my next question. Where
14 did you go to take the test?

15 A. I think it was located in the school. I'm not -- I don't
16 remember the name of the school, or anything like that.

17 Q. But those were tests administered to you by someone at
18 the school?

19 A. Yes.

20 Q. They weren't tests that your mother administered to you,
21 for example?

22 A. That's correct.

23 Q. And that's also true of the Iowa Test of Basic Skills and
24 Cognitive Abilities Test, which you took in the sixth grade?

25 A. Yes.

1 Q. And do you have any recollection of taking that test?

2 A. I vaguely remember that. I know we did have standardized
3 tests at St. Gabriel's school, so I don't remember
4 particularly that test.

5 Q. Okay. But that's one you took?

6 A. I do remember taking the standardized tests.

7 Q. And according to the score report, that's a test you took
8 at St. Gabriel's school, right?

9 A. Correct.

10 Q. So at that time, you're back in school?

11 A. Correct.

12 Q. And when you were being home schooled, you didn't have an
13 IEP or any state approved accommodation plan?

14 A. No. It wasn't necessary.

15 Q. And then likewise, when you took the Iowa test, the Basic
16 Skills and Cognitive Abilities Test, you didn't have an IEP in
17 place at St. Gabriel, I believe you testified?

18 A. Not that I'm aware of.

19 Q. Did you have any other kind of state approved
20 accommodation plan in place at St. Gabriel?

21 A. Not that I'm aware of.

22 Q. Do you recall taking any other standardized test at
23 St. Gabriel?

24 A. I know we took standardized tests. I don't know if it
25 was every year or every other year. I can't remember how

1 often we had to take them, but probably, yeah.

2 Q. Okay. And I think the next one we get to is you took the
3 PSAT in the eleventh grade, 2002?

4 A. That sounds right.

5 Q. And you took that -- at that point, you had not applied
6 for accommodations?

7 A. That's correct.

8 Q. Right. And at that point, you had not been examined by
9 Dr. Alexander, so you didn't have an evaluation report to
10 support accommodations, did you?

11 A. That's correct.

12 Q. And your Moeller Assistance Plan was put in place after
13 that, correct?

14 A. Officially, yes.

15 Q. Look if you would at DX24. This time I can at least keep
16 it in the same notebook. And when you get to 24, look at
17 Exhibit 5.

18 You'll see this is a second copy of your PSAT score
19 report that you looked at earlier?

20 A. Is that the second page?

21 Q. Yes, should be that if you're in Exhibit 5.

22 A. Oh, Exhibit 5. I'm sorry. I thought you said 25.

23 Q. No, it's 24, and then Exhibit 5 within. I apologize. It
24 gets confusing at the end. So go to Tab 24 first.

25 A. Okay.

1 Q. And then within that tab, look for Exhibit 5.

2 A. This is in the defendant document?

3 MR. BURGOYNE: Yes. May I approach the witness, Your
4 Honor, and just sort of help him?

5 THE COURT: Yes, you may.

6 A. Sorry. Is this Exhibit 24?

7 Q. This is your PSAT that you testified about earlier.

8 A. Hold on just one second.

9 Q. Sure.

10 A. So you said I have to go to 24?

11 Q. Yes. And then Exhibit 5.

12 A. Exhibit 5. Okay. This is looking better now.

13 Q. Yes. My apologies. And this is the document that
14 reflects your performance on the PSAT without accommodations,
15 correct?

16 A. Yes.

17 Q. And I believe you testified that there were some answers
18 that you omitted?

19 A. Yes.

20 Q. At that time, there was a penalty, wasn't there, for
21 guessing?

22 A. I believe so.

23 Q. So students were encouraged, if you don't know the
24 answer, don't guess?

25 A. Okay.

1 Q. And in fact, while you did omit some answers at the end
2 of these sections, you also omitted some answers earlier on
3 some of these sections?

4 A. I can see how that happened, yes.

5 Q. And at the end of that exercise, I think we discussed
6 that you performed in the top 23 percent of all examinees
7 across the country with your overall percentile?

8 A. I suppose so, if 77 is indicative of that.

9 Q. Okay. And then we move on, and you take the Medical
10 College Admission Test, correct? That's your next
11 standardized test -- well, you took the SAT?

12 A. Right.

13 Q. You received 50 percent extra testing time, and you
14 scored in the 91st percentile?

15 A. Yes.

16 Q. After that, your next standardized test is the MCAT?

17 A. Yes.

18 Q. Okay. And you first took that in September of 2009, and
19 then you took it again in September of 2010, correct?

20 A. Sounds correct.

21 Q. And you requested 50 percent extra time based upon a
22 diagnosis of a learning disability; is that correct?

23 A. I believe so.

24 Q. And the learning disorder that you had been diagnosed
25 with was disorder of written expression, correct?

1 A. I believe so.

2 Q. It wasn't a reading disorder, it was disorder of written
3 expression, and that was the diagnosis from Dr. Smith?

4 A. I would have to refer back to his report to say that's
5 what it says.

6 Q. Okay. We'll do that.

7 A. Sure.

8 Q. You did not identify any ADHD diagnosis at that time as a
9 basis for accommodations on the MCAT?

10 A. I don't believe that was included.

11 Q. Okay. Look, if you would, at DX17, Tab 17 in the
12 defendant's exhibit that you have in front of you.

13 This is the document called "Welcome to the 2010 MCAT
14 Essentials."

15 MR. BURGOYNE: And Your Honor, this is from the
16 Association of American Medical Colleges, which administers
17 the MCAT exam.

18 Q. And this is a document you've seen before, isn't it,
19 Mr. Berger?

20 THE COURT: Give him a chance to get there.

21 MR. BURGOYNE: Sure.

22 A. I'm just looking through to see what's in the document
23 here. I mean, it looks similar to what I would have looked at
24 at the time.

25 Q. And in fact, this is the document that examinees are

1 required to read and acknowledge that they've reviewed before
2 they take the MCAT exam?

3 A. I don't remember that, but it's possible.

4 Q. I'll help you out. "Required reading," if you look at
5 the bottom of the page, and that it indicates, "Please note
6 that you are required to read the 2010 MCAT Essentials before
7 you register." And then, At the time you register, you'll be
8 required to certify that you've reviewed this material. And
9 then if you look at page 3 of this document, there's a
10 description of the exam content?

11 A. Okay.

12 Q. And this is the exam content that was on the exam both
13 times that you tested, 2009 and 2010?

14 A. I believe at a later date they changed the format, but I
15 think it was consistent when I took it both times.

16 Q. And then on the next page, you can see there's a
17 description of the specific content on the exam, and how many
18 questions there are?

19 A. Yes.

20 Q. And it looks like there were 40 verbal reasoning
21 questions, 52 in the physical sciences, and then 52 in the
22 biological sciences, correct?

23 A. Sure. I believe so.

24 Q. And was there also a writing component on the MCAT?

25 A. Yes.

1 Q. Go next, if you would, please, to Exhibit 18, to the next
2 exhibit.

3 And this is also a document from the Association of
4 American Medical Colleges, and it's titled "MCAT Release Form
5 For the State of New York, (Form administered on January 29,
6 2010)." Do you see that?

7 A. I see that.

8 Q. And will you thumb through here and just confirm that
9 this appears to be a sample MCAT form from 2010, and it
10 contains the same sections that were on the exam when you
11 tested?

12 A. Do you want me to go through all of this, or just --

13 Q. This looks familiar to you? That's all I'm trying to
14 establish.

15 A. The format looks similar.

16 Q. Okay.

17 A. When I took it, it was a computerized test so it's a
18 little bit different, but it looks similar, at least the
19 physical sciences section does.

20 Q. And in that respect, the MCAT is very similar to the
21 Step 1 and Step 2 CK exams, they're both computer administered
22 exams?

23 A. Yes.

24 Q. And the MCAT exam is roughly a five-hour exam?

25 A. I suppose so. If that's what it says, sure.

1 Q. And let's just look quickly at a sample, but on page 5 of
2 Exhibit 8, there's a sample physical science question.

3 A. Okay. I'm on page 8.

4 Q. All right. And do you see there -- well, you're on
5 page 8. That's fine too. Actually, go to page 5, that's
6 where the passage is.

7 So the question begins with a passage that's on page 5,
8 and then it's followed by a series of questions relating to
9 that passage.

10 A. Yes.

11 Q. And then if we go look at how the verbal reasoning
12 section is structured. If you go to page 29, and you see
13 there there's a verbal reasoning question there for you to
14 look at?

15 A. There's a passage on page 29.

16 Q. Correct. And then that's followed by a series of
17 questions, all of which relate to the passage?

18 A. Correct.

19 Q. And then finally, if we go to the biological sciences --
20 let me ask you, first of all, the passage that you're looking
21 at on page 29, is that longer or shorter? How does that look
22 compared to one of the vignettes on the Step 2 CK exam?

23 A. This passage is longer than one of the clinical
24 vignettes, like for one question on the step exams.

25 Q. Okay. And then I interrupted you there, but take a look

1 at page 50. And this is where the biological sciences
2 questions appear. And are they structured the same way, where
3 there's a passage, and then it's followed by a series of
4 questions that you have to answer?

5 A. I believe so. Yes, it looks like it.

6 Q. And I want to make sure I got this right. I think you
7 testified that your strategy the second time you took the MCAT
8 was you didn't read the passages at all, all you read was the
9 questions?

10 A. For the verbal portion, yes.

11 Q. And I think you testified that you developed a special
12 test taking strategy for taking that exam and the other Step 2
13 exam, different strategies?

14 A. Yeah. I tried to optimize my performance through testing
15 strategies, yes.

16 Q. And that's not uncommon, is it, for students to develop
17 test taking strategies?

18 A. I think most students try to optimize their performance,
19 yes.

20 Q. And I think you also said that you randomly guessed when
21 you were entering verbal reasoning questions on the MCAT?

22 A. The first time specifically, yeah.

23 Q. Did you randomly guess on the other sections the first
24 time you took the MCAT?

25 A. I ran out of time, so I did have questions I had to guess

1 on, yes.

2 Q. Let's look at Exhibit 24. And then within Exhibit 24,
3 please look at Exhibit 4. These are your MCAT results?

4 A. Yes, this is the 2010 MCAT scores.

5 Q. All right. So in 2010 -- first of all, all of your MCAT
6 scores were in the average range, weren't they?

7 A. I don't know. Some of them are 10th to 20th percentile.

8 Q. Where your total score is in the percentile range 38 to
9 43, was that an average score?

10 A. If it says so, it must be.

11 Q. And then on the 2010, you scored in the 67.8 to the 83.4
12 percentile, so that means you were no worse than the top 23
13 percent of all examinees who took that test, and perhaps as
14 high as the top 17 percent of individuals on that section of
15 the test?

16 A. Based on those percentile numbers, that would make sense.

17 Q. Yes. And it's your testimony you got that score by not
18 reading the passage and only reading the questions?

19 A. Yes.

20 Q. And then if we look at the next page, these are your 2009
21 results, correct?

22 A. Yes.

23 Q. And in 2009, this one didn't get a lot of discussion this
24 morning, but on your biological sciences section, you scored
25 in the 58th percentile to the 77th percentile basically; is

1 that right?

2 A. I see that here.

3 Q. Okay. And that's a very good score, you'd agree with
4 that?

5 A. I suppose so.

6 Q. You took Step 1 the first time in March 2014. Did you
7 take a test preparation program in advance of taking Step 1?

8 A. Yes.

9 Q. Who did you use for that test prep?

10 A. It was Kaplan.

11 Q. I apologize, Your Honor, and Brendan. One of the things
12 you testified to this morning is that when you took the MCAT
13 the second time, you had studied more, and you felt like you
14 were more knowledgeable and better prepared?

15 A. Correct.

16 Q. You think that's part of the reason you did better on the
17 exam the second time?

18 A. It may have played a role, but I think that my test
19 taking strategy was what made the difference in the scores.

20 Q. Let's take a look here, just so we get a sense of what
21 the Step 1 exam looks like compared to the MCAT. First of
22 all, I think you described that as an extremely demanding
23 exam, Step 1. Do you agree with that?

24 A. Yes, I would agree with that description.

25 Q. And I think you said, when you got out of that exam, you

1 were exhausted and could hardly think?

2 A. Yeah. I think I -- my words were that it felt like my
3 brain had been sucked by aliens, so yes.

4 Q. Do you think other examinees had the same reaction after
5 taking that exam?

6 A. Possibly.

7 Q. Would it surprise you if that was a common reaction to
8 anybody who had just taken an eight-hour standardized test?

9 A. Well, I'm sure it's grilling for most people to take that
10 test.

11 Q. Look at Exhibit 23, and within Tab 23, look at Exhibit G.

12 MR. BURGOYNE: While he's getting oriented, Your
13 Honor, I'll identify Exhibits G and H are sample practice
14 questions for the Step 1 and then for the Step 2 CK exam.

15 Q. And have you seen questions before posted on the USMLE
16 website that constitute practice questions?

17 A. Yes.

18 Q. Okay. So these look familiar to you, this -- if not
19 these particular questions, I take it you can -- in fact, you
20 may even have reviewed these questions in preparation for your
21 exams?

22 A. I'm assuming that the questions change from time to time,
23 but maybe some of them are the same. I'm not certain about
24 that.

25 Q. Okay. In Exhibit G, page 3, there's some recommended

1 strategies for answering questions. Take a look at that for
2 me.

3 A. Page 3?

4 Q. Page 3. And it's second heading from the top.

5 A. Okay.

6 Q. And do you see the last bullet point there, "If unsure
7 about an answer, it is better to guess, since unanswered
8 questions are automatically counted as wrong answers"?

9 A. Yes.

10 Q. So you were aware going in to both your step exams that
11 you should guess, and that that's better than leaving an
12 answer unanswered?

13 A. Yes.

14 Q. And then at page 5, could you just explain to the Court
15 what these two pages are?

16 A. So the exam has reference values. So if it provides lab
17 work, or something like that, the values are accessible on a
18 side tab. If you click, it will come up with these, I
19 believe.

20 Q. So at various points in the exam, if a question called
21 for a lab value, you would click on that link, this
22 information would come up, and you'd consult that information
23 to answer the question?

24 A. Well, because of my lack of time, I didn't feel that I
25 had time to read extra pages that were not related to

1 questions, so one of my strategies was to memorize as many lab
2 values as I could. But this is available on the exam for
3 people who want to look at it, yes.

4 Q. Do you recall consulting the lab values at any point when
5 you were taking the exam?

6 A. I might have looked at it once or twice, but I know that
7 I tried not to.

8 MR. BURGOYNE: Your Honor, I won't belabor it, but
9 this, as I say, this sample illustrates the type of content
10 found on the Step 1 examination.

11 Q. And then Exhibit H, would you look at that document for
12 me, Brendan.

13 And would you confirm that these are representative of
14 the questions that are found on the Step 2 CK exam?

15 A. After reviewing the first block, it does seem like the
16 format is similar.

17 Q. Look at DX14, if you would. Step 1 you took in March
18 2014. DX14, again, is a collection of emails that were
19 produced to us by Dr. Beach.

20 A. Okay. I'm there.

21 Q. And then if you'd look, please, at the page that ends 010
22 within that collection.

23 A. Okay. I'm there.

24 Q. Looks like on the top email here, dated April 2, 2014, it
25 looks like you were providing a report to Dr. Beach on taking

1 the Step 1 exam?

2 A. I would assume so.

3 Q. And you say there, "I think I did well with time
4 management, but the exam was long and grueling. I should know
5 my score in about a month."

6 A. I see that.

7 Q. And did you report anything to her at that time about
8 randomly guessing at any answers?

9 A. I mean, as far as email correspondence, I'm sure this is
10 the correspondence we had. I know at some point I did discuss
11 with her what my experience was during the exam, but I don't
12 remember what the date was that we had that discussion.

13 Q. Okay. And then, again, you passed the exam on your first
14 attempt, not with a score as high as you would like, but I
15 think it was a 198 and the passage was 192?

16 A. That sounds correct.

17 Q. You then took the Step 2 clinical skills exam next,
18 correct? Actually, you had already taken it by that point,
19 right?

20 A. Took it when?

21 Q. I apologize. You took Step 2 CS in 2016 the first time?

22 A. Yes, that sounds -- probably that's correct.

23 Q. And let's look at DX21.

24 MR. BURGOYNE: I apologize, Your Honor. I don't
25 think my notes track what I'm looking for here. It's actually

1 Exhibit 16. I apologize.

2 Q. And this is a complete collection of your score reports
3 for the step exams. The first report I think we've seen?

4 A. The Step 1 results, yes.

5 Q. Right. You passed. And then I don't know the version
6 you provided to the Court included the second page here
7 earlier, but would you explain to the Court what page 2 of the
8 score report is?

9 A. So this is what they call the performance profile, and
10 based on my understanding of it, questions are, I guess,
11 categorized into different groupings, and I think questions
12 can actually be in multiple groupings, not just one grouping.
13 I don't know exactly the details. But when you complete the
14 exam, you're provided with this performance profile to show
15 which topics, I guess, you had stronger performance in and
16 weaker performance in.

17 Q. And fair to say you did better in some areas than you did
18 in other areas?

19 A. The -- yes. The further to the right the bars are, the
20 better it's considered. The further to the left, the worse it
21 is. And the wider it is, the less accurate that is. I
22 believe that's what that means.

23 Q. Okay. Take a look at the next page and confirm for me
24 that this is the score report from your first clinical skills
25 test?

1 A. Looks like it, yes.

2 Q. And this time, you only get a pass/fail on this exam,
3 correct?

4 A. Yes.

5 Q. You don't get a score?

6 A. Scored a pass/fail.

7 Q. And there's three parts to that exam?

8 A. That's correct.

9 Q. And the first is integrated clinical encounter, ICE?

10 A. Yes.

11 Q. The second is communications and interpersonal skills?

12 A. Yes.

13 Q. And the third is spoken English proficiency?

14 A. Yes.

15 Q. And there's virtually no reading. There's a little bit
16 of reading on that exam, but it's mostly patient interaction?

17 A. Yes and no. There are sentences that you have to read
18 before you enter the patient room that give you information
19 about the patient scenario. And then you're expected to take
20 notes and record basically how the interview goes, and then
21 use those notes to afterwards write up a patient note on the
22 computer. You have to type it up.

23 Q. Okay. And you took this exam without accommodations?

24 A. That's correct.

25 Q. And then page 2 reflects where your performance was on

1 this particular administration?

2 A. It says, I think, four in the bottom right corner.

3 Q. It does, yes, handwritten four.

4 A. This is the performance profile.

5 Q. And it looks like the reason you didn't pass was because
6 of your performance on the communication and interpersonal
7 skills?

8 A. That's what this shows.

9 Q. But you did very well with spoken English proficiency?

10 A. Yes, I see that.

11 Q. And then is the next page your score report from the
12 August 2016 clinical skills exam?

13 A. Yes.

14 Q. And you took this without accommodations?

15 A. Yes.

16 Q. And you achieved a passing score this time?

17 A. Yes.

18 MR. BURGOYNE: And then, Your Honor, the last four
19 pages consist of his Step 2 CK reports, with the performance
20 profile for each exam.

21 Q. Is that correct, Brendan?

22 A. Yes, that looks to be correct.

23 Q. Switch notebooks, if you would, for me. I'd like to
24 quickly go through your evaluation history. I'll let you get
25 that notebook open before I start asking you questions.

1 A. Which exhibit?

2 Q. Why don't you go ahead and open to PX23.

3 Let's walk back sequentially. You were first evaluated
4 in 1992 by Sharon Collins when you were in kindergarten?

5 A. Yes.

6 Q. You were next evaluated March 1994 by Dr. Artner when you
7 were in the second grade?

8 A. Yes.

9 Q. And then your next evaluation comes in January 2003, when
10 you are seen by Dr. Alexander Smith, correct?

11 A. Sounds correct.

12 Q. And in this document, looks like Dr. Smith saw you over
13 three days of his assessment, on the left there?

14 A. Yes, that's what it looks like.

15 Q. And these are the tests he administered for you at that
16 time?

17 A. Yes, I believe so.

18 Q. One of them is the Brown Scale For Attention Deficit
19 Disorders?

20 A. That's what is listed here, yes.

21 Q. And then at the top of the next page 2, he reports why
22 you've come to see him?

23 A. It says "background and referral information."

24 Q. Yes.

25 A. Okay.

1 Q. It says you're currently in your junior year at Moeller
2 High School?

3 A. Yes.

4 Q. And then it goes on to say, Both Brendan and his father,
5 Dr. Berger, wished to both document any deficits that may need
6 appropriate accommodation for college entrance tests, as well
7 as to more clearly define the nature of problems he may be
8 experiencing. Do you see that?

9 A. Yeah, that sounds correct.

10 Q. So you went and got this evaluation shortly before you
11 were taking the college admissions test?

12 A. It was before the SAT, yes.

13 Q. And did you ever end up taking the ACT exam?

14 A. No, never.

15 Q. So you've never received accommodations on the ACT exam?

16 A. I've never requested or taken it.

17 Q. Okay. And then the information -- was your mother with
18 you at this evaluation?

19 A. I don't recall. I don't recall if she was there. It's
20 possible. This place was located like across the street from
21 my school, and my school's the one who recommended Dr. Smith.
22 So I don't remember how I got there, I mean, if I was driven
23 across the street or walked across. I don't remember,
24 honestly.

25 Q. Okay. And at the bottom here, one of the things that is

1 reported by Dr. Smith is that you grew up in a bilingual
2 family?

3 A. Where is that?

4 Q. Right above "interview information."

5 A. Oh, I see that here.

6 Q. And was that information you provided to him?

7 A. It's possible.

8 Q. And then if you look at page 3?

9 A. Is that the next page?

10 Q. Yes. Yes. And he's discussing there a meeting between
11 the Moeller committee and a psychologist from Princeton
12 schools?

13 A. The second paragraph here?

14 Q. Yes. And he's reporting that the Moeller committee had
15 concluded that there was no need for special education
16 assistance at that time, and there were no major concerns
17 along those lines?

18 A. I see what he's written here.

19 Q. Good. Do you know what that Moeller committee is that's
20 being referred to here?

21 A. I'm not certain.

22 Q. Is that Ms. Kagy's office?

23 A. I'm not certain.

24 Q. And then on page 6, there's a discussion of the question
25 of a learning disability.

1 THE COURT: Can you refer to the PX number at the
2 bottom of the page. It's hard for us.

3 MR. BURGOYNE: I apologize, Your Honor. I don't have
4 the version that has PX numbers at the bottom, so --

5 THE COURT: Okay. We don't have the numbers that
6 you're referring to.

7 MR. BURGOYNE: You don't have numbers at the top?

8 THE COURT: No.

9 THE WITNESS: I don't see them.

10 MR. BURGOYNE: Because that's the version that was
11 provided to NBME. Just one moment. Okay. Well, I have the
12 PX numbers at the bottom. Strange.

13 Q. So I am looking at 272. Again, in the very last part of
14 the paragraph, the question of a learning disability, there's
15 the discussion, and it's referring again to the fact that the
16 Moeller committee meeting with the psychologist from the
17 Princeton schools determined there was no need for special
18 education assistance. Do you see that sentence?

19 A. Is that the last sentence?

20 Q. Last sentence in the paragraph.

21 A. I see that sentence, yes.

22 Q. What was the relationship between Princeton schools and
23 Moeller? Why were those two entities meeting on the question
24 of possible special needs assistance?

25 A. So Moeller is the private school that I was attending,

1 and Princeton is the public school district in which I lived.

2 Q. And did the school district have to approve of any
3 accommodation program that was put in place for you?

4 A. My understanding is that as a private school, Moeller
5 could institute any accommodations that they wanted, but if
6 they were seeking public funding, I guess they could seek
7 approval for public funding, but I don't really know the
8 details of that.

9 Q. Okay. And then at the top of the next page, there's a
10 discussion of whether or not you need extra time on the ACT or
11 SAT?

12 A. I see that.

13 Q. And it says in the middle of that paragraph, "He has been
14 noted to have difficulty finishing on time, though it is noted
15 that this is not uncharacteristic for other students in
16 several of his classes."

17 A. I see that.

18 Q. Is that information you provided to Dr. Smith?

19 A. Possibly. I don't recall telling him that.

20 Q. And then at the bottom of the next page is where he
21 provides a suggested diagnosis, learning disorder of written
22 language?

23 A. In bold at the bottom here?

24 Q. Yes. Correct.

25 A. Uh-huh.

1 Q. And so Dr. Smith did not diagnose you with ADHD in 2003?

2 A. That's my understanding.

3 Q. And likewise, he didn't diagnose you with a reading
4 disorder in 2003?

5 A. He diagnosed me with whatever this is, I'm assuming,
6 learning disorder of written language.

7 Q. Did there come a time when Dr. Beach diagnosed you with
8 both a learning disorder of written language, of written
9 expression, and a disorder of reading?

10 A. I believe so.

11 Q. Look if you would, please, at Exhibit 17.

12 And this is the evaluation that was performed when you
13 were in the second grade?

14 A. Yes.

15 Q. And there's a statement here, look right above
16 "behavioral observations"?

17 A. On the first page, or --

18 Q. It's on page 3, where it says page 3 at the bottom on the
19 original document.

20 THE COURT: We don't have a page 3. We have PX243.
21 Are you looking at the plaintiff exhibits?

22 MR. BURGOYNE: Yes. I'm looking at the plaintiff's
23 exhibit, Your Honor, but the version I'm looking at is what
24 went to --

25 THE COURT: Oh, I see. Yes, it's obliterated

1 partially, so I see a three, so it's PX245, for the record.

2 MR. BURGOYNE: Thank you, Your Honor.

3 Q. And you see where it's behavioral observations at the
4 bottom there?

5 A. I see that.

6 Q. And it says, "It was reported that Brendan understands
7 French but does not speak it"?

8 A. Above behavioral observations?

9 Q. Yes.

10 A. I see that.

11 Q. And you think that was accurate information, when you
12 were in the second grade, you understood French but you didn't
13 speak it?

14 A. I could understand some French words, but I'd say saying
15 I understood French is reaching.

16 Q. You went to see Dr. Smith again in October 2008, correct?

17 A. So 2003, in 2008, that sounds correct.

18 Q. You went to see him that time because you wanted to get
19 accommodations on the MCAT exam?

20 A. I believe that was in anticipation of applying, yes.

21 Q. And then you went to see him again in 2010, and that was
22 to help you get reconsideration of the original denial?

23 A. So after -- yes. After the first denial, I went back to
24 him.

25 Q. And then after AAMC denied it again, and you wanted to

1 get another consideration, you went to see Dr. Beach?

2 A. Yes.

3 Q. And the first time she diagnosed you, Dr. Beach, was that
4 a comprehensive evaluation?

5 A. In 2010?

6 Q. Yes.

7 A. I believe it was an addendum or an update. I don't think
8 it was a full eval. I don't remember exactly.

9 Q. All right. We can look at it. In all events, at that
10 point, she did not diagnose you with ADHD, did she?

11 A. I don't remember.

12 Q. Have you applied for accommodations recently on the GRE
13 exam?

14 A. Yes.

15 Q. And in connection with that exam, did you get another
16 evaluation from Dr. Beach?

17 A. Yes.

18 Q. All right. And at that time, did she provide a new
19 diagnosis for you in support of requests for accommodations on
20 that exam consisting of a learning disability in math?

21 A. Possibly. I don't remember if there was a new diagnosis
22 on there.

23 Q. And is there a math component on the GRE?

24 A. That's my understanding, yes.

25 Q. Are you registered to take the Step 2 CK exam?

1 A. I purchased the scheduling permit back in February from
2 ECFMG, so yes.

3 Q. That has expired, hasn't it? It's a three months --

4 A. No, it's on hold until a decision is made regarding my
5 accommodation status.

6 Q. Who put that on hold? What do you have that --

7 A. So it's standard procedure that when you apply for a
8 scheduling permit with accommodation through ECFMG, you pay
9 for it, and then it is basically kept on hold until NBME
10 renders a decision about whether accommodation is granted or
11 denied.

12 If accommodation is denied, then the scheduling permit is
13 issued at that time; and if it's granted, then it's issued
14 with, I guess, accommodation. So based on the decision of
15 NBME, the permit will be granted.

16 Q. So ECFMG issues a permit, and then at that point, who
17 schedules the test?

18 A. So my understanding is the ECFMG basically handles
19 foreign medical graduates, which is what I am because I went
20 to the Caribbean for medical school. But I believe that the
21 money that they get, I guess, is somehow paid to the NBME.
22 I'm not really certain exactly how that works, but I just know
23 that the permit I requested is on hold until a decision is
24 made by NBME.

25 THE COURT: Now I'm confused by this line of

1 questioning. So who is ECFMG? What does it stand for?

2 THE WITNESS: So I actually don't know what the
3 acronym stands for, but basically it's -- so whenever you have
4 to apply for NBME exams as a foreign medical graduate, ECFMG
5 is the one you apply to. You don't actually apply, I guess,
6 directly with the NBME or USMLE, which is what U.S. students
7 would do.

8 And so the ESFMG's role is basically they make sure that
9 all the documents are in order for all the foreign doctors, so
10 that they have confirmed that you are able to take the exam,
11 and they're not letting people who don't fulfill the criteria
12 get scheduling permits and take the exams.

13 So as a foreign medical graduate, I pay them, and then I
14 guess they interface with the USMLE or NBME, and then the
15 scheduling permit is scheduled.

16 THE COURT: And what is a scheduling permit?

17 THE WITNESS: A scheduling permit is a period of time
18 during which I'm able to pick a test date. So when you apply
19 for a scheduling permit, you pay for the exam, and then it
20 grants you -- you tell them when you want to request to take
21 the exam. Basically, it's a three-month time period that
22 you're able to sit for the exam.

23 When I applied for it back in February, I believe I
24 requested, I think March through June, or something like that,
25 for my eligibility time period, but it's still on hold because

1 a decision hasn't been reached.

2 THE COURT: A decision by whom?

3 THE WITNESS: A decision about accommodations. I
4 don't know if it's NBME that would be issuing that and then it
5 would be released, or if it's the Court's decision or not.
6 I'm not certain exactly how that would work.

7 THE COURT: Okay.

8 THE WITNESS: But when you apply, there's a question
9 where you say are you applying for this with accommodation or
10 without. And if you're applying for it with accommodation, it
11 basically processes by them, and then it goes in a holding
12 pattern until a decision about accommodations has been
13 reached.

14 THE COURT: When was the last time you took the
15 Step 2 CK? When was the last time?

16 THE WITNESS: I believe it was in 2018.

17 THE COURT: And then you made a subsequent request
18 for an accommodation, correct?

19 THE WITNESS: Correct.

20 THE COURT: And that was denied?

21 THE WITNESS: Yes, I believe so.

22 MR. BURGOYNE: Your Honor, just the chronology here,
23 if it's helpful. He last took the Step 2 CK in August 2018.
24 So I think his last request for accommodations was in 2017. I
25 don't think there's a subsequent one.

1 THE COURT: Okay. And that's what I'm confused
2 about, because what I was hearing was that after the Step 2
3 CK, there was a subsequent request for accommodation made for
4 the ability to take a third Step 2 CK.

5 MR. BURGOYNE: There is no pending accommodation
6 request, nor was there a post August 2017 or August 2018
7 request. So there's no additional documentation request that
8 was submitted to us after the last taking of the Step 2 CK.

9 THE COURT: Okay. So then I guess I'm confused about
10 how the permit got placed on hold, and maybe it's pending this
11 decision, the lawsuit. I don't know if anybody can --

12 MR. BURGOYNE: I don't know the status, Your Honor.
13 All I know is that there are steps that have to take place
14 relative to the ECFMG before he would even be in a position to
15 test, and that's why I was asking him where all that stood.
16 And I don't know the status of -- his registration status, or
17 how long it would take ECFMG to process any information, or
18 anything like that. They're a distinct organization from us.

19 THE WITNESS: May I speak?

20 THE COURT: Yes. Go ahead.

21 THE WITNESS: So in the past, when I have requested
22 accommodation from the NBME on the Step 2 CK exam, I would
23 submit the documentation from the psychologist, and the
24 historical documents and all of that, and as a part of that, I
25 believe that I would also pay on the ESFMG's website for this,

1 basically, permit request. And then once that has been
2 processed on their end, it usually takes them about two weeks
3 to do that, then it's in holding until the NBME would make a
4 decision about accommodation.

5 So then when the letter would come back saying it was
6 denied accommodation, within a couple days, basically, the
7 permit would become active, and I would have three months of
8 eligibility, and then I would have to go on the Prometric
9 website and pick an actual test date within that three-month
10 time period.

11 And I do agree with what Mr. Burgoyne said. I submitted
12 documentation to NBME before I took the exam in 2018. And I
13 think that was the last submission. I can't remember if it
14 was in 20 -- I don't remember. I think that was the last
15 submission, and it was denied, and then I took the exam with
16 accommodation.

17 But when I actually requested through ESFMG, it says are
18 you requesting this exam with accommodation or without? And I
19 checked with accommodation, because it was, as far as I
20 understood, pending the decision of the courts about whether
21 accommodation is appropriate or not.

22 THE COURT: Okay. Thank you.

23 BY MR. BURGOYNE:

24 Q. Mr. Berger, look if you would, please, at -- it's our
25 exhibit, so the defendant's exhibits. I'm not sure which one

1 you have in front of you. I'm going to direct your attention
2 to Exhibit 15. Do you have that in front of you?

3 A. Yes.

4 Q. Is this your official transcript as of 2017, July 2017,
5 from your medical school?

6 A. Looks like it, yes.

7 Q. And does this have your class rank on it?

8 A. In the top right corner, it says medical sciences rank.
9 Is that what you're referring to?

10 Q. Well, that's my question, is that your class rank there?

11 A. I'm not certain if that is my class rank or not. I don't
12 know.

13 Q. What does medical sciences refer to there?

14 A. So medical sciences is probably their term for basic
15 sciences, which is the first two years of medical school.

16 Q. Do you know what your class rank is?

17 A. No, not certain.

18 Q. And about how many students are in your class?

19 A. I know when I started, the group I was with was -- they
20 have three groups per year, and the group I was with was 115,
21 or something like that. But there are changes, and I've been
22 switched to different groups because of the delay, so I'm not
23 certain even what class I'm technically in as far as the
24 school is concerned.

25 Q. So you don't know whether as of July 2017, your class

1 rank was 70 out of 92 students?

2 A. I'm assuming this is based on my medical sciences
3 performance, so -- but I don't know if anything related to my
4 clinicals is included in that calculation.

5 Q. Has your dean written a dean's letter for you that you're
6 going to rely on as part of your electronic residency
7 application process?

8 A. I have requested an MSP letter from my school.

9 Q. You don't have one currently?

10 A. They prepared one in 2016. I don't have an updated one
11 this cycle yet, if that's what you're asking.

12 Q. And you've got to have that as one of your credentials to
13 participate in the match, correct?

14 A. It's part of the application.

15 Q. Okay. And do you have any understanding when you're
16 going to be provided with that document?

17 A. I'm not certain.

18 Q. In connection with your testimony about residency
19 program, could you give the Court a little better
20 understanding of how the whole process works in terms of what
21 you have to do to participate in the match? First of all, for
22 example, do you have to submit an application through the
23 electronic residency application service?

24 A. There's a centralized application, yes.

25 Q. And that's operated by the Association of American

1 Medical Colleges?

2 A. Possibly. I don't remember the name of who manages it.

3 Q. And have you submitted your application yet for the
4 residency application process?

5 A. No.

6 Q. And when do you plan to do that?

7 A. I was planning on doing it as soon as I take the exam.

8 Q. And then you need a dean's letter as well, and you don't
9 have that yet?

10 A. There is a version from 2016 that can be updated quickly,
11 if need be, so it shouldn't take long to provide that.

12 Q. Okay. But that's out of your control, the dean deals
13 with that, and --

14 A. Yeah. There's people at my school that would be dealing
15 with that, yes.

16 Q. And then what other credentials do you have to submit to
17 the match program to participate in the match?

18 A. My understanding is that the application includes letters
19 of recommendation from attendings, the dean's letter, and
20 scores on the step exams. I think there's also a personal
21 statement component, if I remember correctly.

22 Q. Have you prepared your personal statement yet?

23 A. Yes.

24 Q. And when do you have to have your Step 2 CK passing score
25 by? Is there a date by which you have to confirm that you've

1 passed the Step 2 CK exam?

2 A. So my school asks students to have their Step 2 CKs taken
3 by the end of August in order to have it as part of the
4 application when the applications go -- the MSP letter is
5 added in the beginning of October. So my understanding is
6 that I have to take it by the end of August in order to be a
7 part of that.

8 Q. Take a look, if you would, please, at -- start with DX,
9 so it's the defendant exhibit. Do you have that in front of
10 you now?

11 A. I have it.

12 Q. And it's Exhibit 21, Exhibit C within that.

13 A. Yes.

14 Q. And would you identify this document for the Court,
15 please?

16 A. It looks like a document from AUC.

17 Q. Have you ever seen this document before?

18 A. It looks familiar, but I haven't looked at it recently.

19 Q. It surprises me. The caption is "United States Medical
20 Licensing Exam Step 2 Clinical Knowledge (CK) Exam, FAQs" from
21 your medical school. And it discusses what's required, when,
22 and everything like that. Your testimony is you haven't
23 looked at this recently?

24 A. I'm sure that I already reviewed it back in 2016, so I
25 didn't review it again recently, that's what I mean.

1 Q. All right. And then there's a discussion on page 2 of
2 the document that -- the question is, "How important are NBME
3 shelf exam and the NBME comprehensive clinical science exam,"
4 and that's the exam you were discussing earlier?

5 A. The comprehensive exam?

6 Q. Correct.

7 A. Yes.

8 Q. And then there's a statement in here that says,
9 "Comprehensive clinical science exam can be a predictor for
10 readiness to take Step 2 CK and must be passed before AUC
11 students are cleared to take Step 2 CK." And I believe you
12 testified that you understand you have a waiver from that
13 requirement?

14 A. That's correct.

15 Q. Do you recall your performance, what your performance was
16 on that exam, how close did you come to pass it?

17 A. I don't remember what the passing score was, but I was
18 not able to pass the exam. I took it multiple times, so -- it
19 would be hard for me to say a specific score.

20 Q. And you took that with extra testing time?

21 A. I had 50 percent extra time.

22 Q. And then if you look at -- the number on the top is
23 page 5 on the original document, and there's a discussion
24 about registering for Step 2 CK?

25 A. I see that.

1 Q. And it talks about how you schedule it.

2 MR. BURGOYNE: And there's a reference here, Your
3 Honor, to the ECFMG.

4 Q. And then it says "when should I take Step 2 CK," and then
5 you see the second paragraph here, "Students need to take
6 USMLE Step 2 CK by December 31, 2018, to help ensure that
7 results will be available in time to participate in the 2019
8 main match"?

9 A. Okay.

10 Q. And this is the document from last year, I should
11 clarify. There isn't a version on the website that I'm aware
12 of applying to the 2020 match. But is it your understanding
13 that you could take Step 2 CK as late as December 31st and
14 still be able to participate in the match?

15 A. My understanding is that technically that is correct.

16 Q. Exhibit E. Same Exhibit 21, but Exhibit E within this.
17 It's two exhibits further in. I don't think you offered this
18 exhibit, but this is the AAMC's denial of your request for
19 reconsideration --

20 A. I see that.

21 Q. -- on the AAMC accommodations, the MCAT accommodations.
22 And do you recall, when you applied for accommodations, AAMC
23 informed you that they had sent your paperwork out to an
24 external reviewer to evaluate your accommodation request?

25 A. That sounds correct.

1 Q. And that external reviewer concluded that you were not
2 substantially limited in any major life activities. Do you
3 recall that?

4 A. I would assume, if the letter says so, that's what they
5 said, yes.

6 Q. Exhibit G, is this the calendar for the 2020 match?

7 A. I think it says 2019.

8 Q. You're exactly right. I printed the wrong one. My
9 apologies. What's your understanding of the timing for the
10 2020 match? Is it also held in March?

11 A. The cycle is similar from year to year.

12 Q. Okay. And then just so the Court understands, there's a
13 deadline by which you submit a rank order list?

14 A. Yes.

15 Q. And that's you put the residency programs you want to
16 interview with?

17 A. No. So the rank order list is after you've done
18 interviews, you rank the programs that you interviewed at and
19 the programs rank the people that they interviewed. So both
20 people rank who they met basically during interviews earlier
21 in the season.

22 And then once that is done, that's entered into an
23 algorithm, and then the algorithm decides which residents are
24 matched up to which programs, and that's what the match is.
25 Basically, it spits out a matchup, which is --

1 Q. But the fact that you interview with somebody doesn't
2 mean you're going to get listed on their rank order list, does
3 it?

4 A. So both sides list who they want on their rank order
5 list, so both sides have control over that.

6 Q. Right. But if a residency program interviews you but
7 doesn't want to put you on their rank order list, they're not
8 required to, are they?

9 A. I don't believe they're required to, no.

10 Q. And then at some point in March or February, there's --
11 the rank order list goes in February 20th, and then there's
12 match week where the algorithm does its process. And then if
13 students don't match, that's when they can participate in what
14 you referred to as the SOAP process or the scramble?

15 A. That's how I understand it.

16 Q. Okay. And if you look at Exhibit H, is that a
17 description of the Supplemental Offer and Acceptance Program?

18 A. It looks to be, yes.

19 Q. And in order to participate in this program, if you don't
20 match as part of the main match process, then you still have a
21 chance to get a residency position by participating in this
22 scramble; is that correct?

23 A. I believe it was instituted so that people would get a
24 chance if there were spots remaining.

25 Q. And if you participate in that process, these are

1 programs that you will not have interviewed with, correct?

2 A. My understanding is that during this process, you either
3 talk to or can be contacted by the program so they may
4 interview you. I don't know how that works, exactly.

5 Q. But if that happens, that's happening next March?

6 A. It would -- yeah, it would probably be near the end of
7 the cycle.

8 THE COURT: Counsel, are you going to move on to
9 another exhibit, because I did have a question about this.

10 MR. BURGOYNE: Okay.

11 THE COURT: I'm looking at 21G, the timeline. So
12 Mr. Berger, you testified that technically you could take the
13 CK exam as late as December the 31, 2019. Where would
14 interviews for residency matching programs, when would that
15 occur, if that was the --

16 THE WITNESS: So residency interview season is
17 basically October -- it's like October, November. Yeah,
18 October, November, December, and then pretty much all the
19 interviews are done at that point. And so if you -- some U.S.
20 grads don't take the CK until sort of later in the cycle, but
21 as a foreign medical graduate, if you don't have a CK score
22 back, your chances of interviews are virtually nil. And so if
23 you -- in my case especially, with two failing CK scores, the
24 likelihood that I would have any interviews late in the season
25 is very minimal.

1 THE COURT: Thank you.

2 BY MR. BURGOYNE:

3 Q. If you don't participate in this year's match, given the
4 status of your arrangement with the school, you'll still be
5 able to participate in next year's match, correct?

6 A. It's possible.

7 Q. And in fact, you could -- if you pass the Step 2 CK
8 before that, you'll be able to get on the interview schedule,
9 and everything will proceed from that point forward?

10 A. I would have a completed application as far as having a
11 passing CK score, so that would be helpful.

12 MR. BURGOYNE: Your Honor, I have two more lines of
13 questioning. Do you want a break, or do you want to have me
14 keep going? I realize I've been going --

15 THE COURT: Two more questions, or two more lines?

16 MR. BURGOYNE: Two more lines of questioning. I
17 don't think it's going to be that long, but --

18 THE COURT: Let's take a ten-minute break.

19 (Brief recess.)

20 THE COURT: Go ahead.

21 MR. BURGOYNE: Thank you, Your Honor.

22 Q. Mr. Berger, we talked briefly about you going to see
23 Dr. Beach in 2010. I believe it was May 2010, is that right,
24 end of May?

25 A. That sounds correct.

1 Q. And you went to her because somebody at your medical
2 school or your undergraduate school, University of Cincinnati,
3 recommended that she is somebody you could go see about
4 getting additional documentation?

5 A. That's correct.

6 Q. And you had no relationship with her previously?

7 A. That's correct.

8 Q. And then you worked very closely with her to develop a
9 strategy for obtaining accommodations from the Association of
10 American Medical Colleges, correct?

11 A. I explained the situation to her, and she evaluated me,
12 if that's what you mean.

13 Q. Did it end there with the evaluation?

14 A. I mean, we discussed the situation, if that's what you're
15 asking.

16 Q. Let me ask it to you this way. She helped you draft your
17 cover letter to send to AAMC, didn't she?

18 A. Yes, I suppose so.

19 Q. And then she would routinely send you drafts of her
20 report, and ask you to read those drafts and provide comments
21 and suggest the changes, wouldn't she?

22 A. She asked me to check for accuracy, to make sure there
23 weren't any typos or inaccuracies in the reports, yes.

24 Q. And you did that every time that she drafted one of her
25 reports?

1 A. Well, if she sent something to me, I tried to review it,
2 yes.

3 Q. And that includes the 90-page report that she sent to
4 NBME. Do you recall reviewing that report?

5 A. Most likely I reviewed it, sure.

6 Q. And then you also discussed what documents you should try
7 to provide to the AAMC and then subsequently to the NBME?

8 A. Well, she informed me that she thought that because I had
9 a long history, and I hadn't included all of the documents in
10 previous submissions, that it would make sense to include as
11 many documents as possible so the reviewers could review
12 everything, yes.

13 Q. And is she the one that suggested you contact someone
14 from St. Gabriel to see if they had any documentation you
15 could use?

16 A. It's possible.

17 Q. And do you know if she contacted Archbishop Moeller to
18 see if they had any documentation that supported the fact that
19 you had gotten accommodations there?

20 A. I believe she did.

21 Q. And do you recall what the outcome of that was?

22 A. My understanding is that Moeller said they didn't have
23 older documents. I know I contacted Moeller as well myself at
24 some point. I don't know if that was before or after
25 Dr. Beach, but --

1 Q. Okay. If you could look at the defense exhibits. Do you
2 have those in front of you?

3 A. That's in front of me, yep.

4 Q. And let's start with DX4.

5 Do you recognize this document?

6 A. Yes. It looks familiar.

7 Q. Do you recall that she prepared it -- well, what is this
8 document?

9 A. I believe this is something that Dr. Beach wrote up.
10 Yeah, I think she wrote up this list.

11 Q. And then take a look at DX14, which are some emails to
12 and from you and Dr. Beach?

13 A. Okay.

14 Q. And in the middle there, she writes, "By the way, the
15 edits you sent me for the introduction and recommendations
16 sections are made in the master copy I am still working on."
17 Do you see that?

18 A. I see that.

19 Q. Do you recall what edits you made to the intro or the
20 recommendations regarding accommodations?

21 A. No.

22 Q. The last thing I have is just some quick cleanup on some
23 documents that I neglected to ask you about, and I apologize.
24 First of all, just closing up on the residency, are there some
25 residency programs that select residents without participating

1 in the match?

2 A. My understanding is that it used to be more common, but I
3 do believe it still exists, but the number of programs is
4 decreasing yearly.

5 Q. Do you support that at all?

6 A. I know people who have gone through what's called
7 pre-matching, which is what I think you're referring to.

8 Q. Now, are you familiar with the Find A Resident program
9 that the Association of American Medical Colleges operates?

10 A. I don't recognize that name specifically.

11 Q. Okay. And you don't know whether or not that's something
12 that international medical school graduates often use?

13 A. I've never heard of an international medical graduate
14 mentioning to me, so no.

15 Q. You discussed earlier your issues you were having with
16 concentration and focus relating to the ADHD diagnosis that
17 you had?

18 A. Yes.

19 Q. Did you have difficulty concentrating and paying
20 attention as a child?

21 A. Yes.

22 Q. And did you have those same issues at age 17, when you
23 were evaluated by Dr. Smith the first time?

24 A. I would assume so, yes.

25 Q. And did you have those same issues when you were

1 evaluated by Dr. Smith at age 23 in 2008?

2 A. I would believe so.

3 Q. And likewise, did you have those same issues when you
4 were first examined by Dr. Beach in 2010?

5 A. Most likely, yes.

6 Q. You mentioned that your school requires or has
7 limitations on how many times you can take and fail the step
8 exams. How many times is an AU student, AUC student, allowed
9 to fail Step 1 without being dismissed from school?

10 A. My understanding is, I think it's three times.

11 Q. Okay. Do AUC students have up to six times to fail the
12 Step 2 CK exam without being dismissed?

13 A. So according to the -- I think it's the ECFMG guidelines,
14 or I don't know if it's USMLE or ECFMG that sets that, but the
15 theoretical maximum is six for anybody taking the exam, but I
16 believe that my school has a limit that might be lower, it
17 might be three.

18 Q. And I take it the reason they have these limits, it's not
19 uncommon for people to fail Step 1 or Step 2 CK the first or
20 second time they take it?

21 A. I don't know if that's the reason they have the limits,
22 but there are certainly students who fail the exams.

23 Q. And those are students without any disabilities?

24 A. Anybody who takes the exam could potentially fail it.

25 Q. Okay. We looked at PX13, which was the list of exhibits

1 that you submitted to the National Board of Medical Examiners
2 in support of your accommodation request?

3 A. I don't specifically remember if this was included or
4 not, but --

5 Q. Do you recall that, in general, when you submitted
6 accommodation requests after you started working with
7 Dr. Beach, your submissions included a list of documents?

8 A. Yes.

9 Q. Okay. I believe -- I thought I heard you testify this
10 morning that this was a list of documents that you provided to
11 the National Board of Medical Examiners?

12 A. From across the room, it looked similar to the index
13 list, yes.

14 Q. Is that the index you have in front of you?

15 A. No, this is the ADHD verification form. You said DX13?

16 Q. No, it's PX. I'm sorry. My apologies.

17 A. Oh, PX. Okay. So we switched.

18 Q. My apologies. PX. That was my pronunciation, not you.

19 A. The request for test accommodation form, is that what I
20 should be looking at?

21 Q. Yes, the index.

22 THE COURT: Or appendix?

23 MR. BURGOYNE: Appendix, yes. Appendix it's called
24 at the top, yes.

25 A. Exhibit 14?

1 Q. 13.

2 A. 13. Okay. I misunderstood.

3 Q. You got that?

4 A. Okay. Here we go. Yes, this is the appendix.

5 Q. And did you work with Dr. Beach to determine what
6 documents you were going to submit in support of your
7 accommodation request?

8 A. I think we might have discussed it, sure.

9 Q. I notice that your list of documents here and subsequent
10 list did not include your 2010 MCAT results. Was there a
11 conscious decision to exclude those MCAT results?

12 A. I don't particularly remember.

13 Q. Okay. They're not on this list, are they?

14 A. There's MCAT score report, but it looks like it's just
15 2009.

16 Q. And then likewise, your results from the PSAT were not
17 provided. Was that a conscious decision not to include your
18 performance results from the PSAT when you provided
19 documentation?

20 A. I don't remember making a decision to omit that, but I
21 know that we had submitted it subsequently, so I don't know
22 why we would have specifically not submitted it and then
23 submitted it later if we didn't want to.

24 Q. Do you know if you submitted it later as part of your
25 court papers, as opposed to submitting it to NBME when they

1 were reviewing your accommodation requests?

2 A. I know it was one of the exhibits that was submitted by
3 Mr. Weiner, if that's what you're referring to.

4 Q. Okay. And then I notice that there were two subsequent
5 letters from the Association of American Medical Colleges
6 denying your reconsideration requests that were not provided
7 to AAMC. Were those omitted for a reason, or do you recall
8 discussing whether they should be provided?

9 A. We had three denials from the AAMC, if that's what you're
10 asking, yes.

11 Q. And did you provide all three of those to the National
12 Board of Medical Examiners?

13 A. I don't believe so. I'm not sure. I think either the
14 first or the second. Maybe just the first one was included.
15 I'm not sure.

16 Q. If you look at, to make sure we get in the record,
17 Defense Exhibit 9. It's the other notebook. Got that?

18 A. Okay.

19 Q. Could you confirm for us, please, that this is the letter
20 that you received from the Association of American Medical
21 Colleges denying your second request for reconsideration?

22 A. That's what it looks like, yes.

23 Q. And this was denying the request that had been submitted
24 on your behalf, or with documentation from Dr. Beach, correct?

25 A. If this is the second denial, I believe that was

1 Dr. Smith's, the submission of information from Dr. Smith.

2 Q. Well, you recall Dr. Beach's first report is June 2010?

3 A. Okay. So maybe this is the third one, then. So if this
4 is the third one, then that would be Dr. Beach.

5 Q. Okay. And in fact, if you look, the second paragraph
6 references Dr. Smith, and then the third paragraph discusses
7 the additional testing that was done by Dr. Beach?

8 A. Okay. I see that here.

9 Q. Do you see that?

10 A. Uh-huh.

11 Q. You indicated you got accommodations on the shelf exams.
12 Was that 50 percent extra testing time?

13 A. Yes.

14 Q. And that accommodation was approved by your medical
15 school. You got that extra time because your medical school
16 approved it?

17 A. That's correct.

18 MR. BURGOYNE: I have no further questions, Your
19 Honor.

20 THE COURT: Thank you. Redirect?

21 MR. WEINER: Thank you, Your Honor.

22 REDIRECT EXAMINATION

23 BY MR. WEINER:

24 Q. The comp exam that had been discussed, you indicated you
25 had 50 percent extended time?

1 A. Yes.

2 Q. That exam, how long an exam is it?

3 A. The comp before the Step 2 CK exam, under standard
4 conditions, I think it's maybe three or -- somewhere between
5 three and four hours, I think.

6 Q. Is it longer than the shelf exams?

7 A. Yes.

8 Q. And when you took that exam, were you able to complete
9 the exam?

10 A. No.

11 Q. Why?

12 A. So the exam is not quite as reading intensive as the
13 actual step exams, but it's extremely long. So with 50
14 percent extended time, I think my exam time was about six and
15 a half hours straight with no breaks. And when I was going
16 through and trying to do that exam, the fatigue and inability
17 to focus hit really hard. I think, honestly, anybody who has
18 to do something like that non-stop for six and a half hours
19 would struggle with that.

20 And it's something that when I was going through, I would
21 hit a wall, where I basically was doing my best and trying to
22 read as quickly as possible; and, you know, even though I had
23 the extra time, I still would get to the point where I just
24 couldn't focus any more, and it was still counting -- the
25 clock was still counting down. And basically, I would guess

1 at answers because if you leave them blank, you -- it will
2 hurt your score, so I had to do that, yes.

3 Q. Were you able to demonstrate your skill and knowledge on
4 that exam with 50 percent extended time?

5 A. No.

6 Q. How would you have been able to demonstrate your skill
7 and knowledge on that exam?

8 A. I think, if I had been given extra time and breaks, it
9 would have been possible.

10 Q. And during Mr. Burgoyne's questioning, there were points
11 about Dr. Beach assisting you with the documentation submitted
12 to both the MCAT as well as NBME. Did you request her
13 assistance?

14 A. Not that I -- I mean, I don't remember specifically
15 asking her to do anything in that regard, other than
16 evaluation.

17 Q. There was a discussion about how many times typical
18 students at AUC can take the Step 2 CK. And you had indicated
19 how many times?

20 A. I think that my school sets a limit of three times.

21 Q. Okay.

22 A. But I don't remember offhand.

23 Q. All right. Has your school set a limit for you in terms
24 of how many more times you can take the Step 2 CK?

25 A. Yes. They're allowing me one more time.

1 Q. And if you go to Plaintiff's Exhibit 60.

2 A. All right. I'm there.

3 Q. Is this the source of your knowledge about how many more
4 times you can take this Step 2 CK exam?

5 A. Yes. This is the letter from Adtalem.

6 Q. All right. And is it in paragraph 2 where they make that
7 statement?

8 A. I believe so.

9 Q. Is it paragraph 2 where you're told you have one more
10 chance?

11 A. So it says here too, and there's one additional attempt,
12 yes.

13 Q. And if you could turn to Exhibit 48, please.

14 A. I'm there.

15 Q. Is this a copy of your prior attorney, Ms. Brown's letter
16 to Dr. Farmer in connection with your 2018 request for
17 accommodations?

18 A. Yes, it looks like it.

19 Q. And this was submitted to the NBME?

20 A. Yes.

21 Q. And if you turn to PX400 and PX -- it got knocked off,
22 but it would be 401.

23 A. Is that Exhibit A?

24 Q. Yes. Exhibit A is your PSAT score?

25 A. Yes.

1 Q. Does that refresh your recollection as to when you sent
2 the NBME a copy of your PSAT score?

3 A. Yes.

4 MR. WEINER: Nothing further, Your Honor.

5 THE COURT: And when would that be?

6 THE WITNESS: In February of 2018.

7 THE COURT: Thank you. Thank you, sir. You may step
8 down.

9 THE WITNESS: Thank you.

10 (Witness excused.)

11 THE COURT: Let's talk a little bit about
12 housekeeping. Your next witness will be Dr. Beach?

13 MR. WEINER: Yes.

14 THE COURT: When we were planning for these two days
15 of hearings, my understanding was that we were going to do
16 both plaintiff's witnesses today and defendant's tomorrow. So
17 I guess the question is, I don't know how much time you plan
18 on taking with Dr. Beach, and I guess I'd like to wrap up by
19 6:00, if we could.

20 MR. WEINER: Okay. Your Honor.

21 THE COURT: And I don't know if Dr. Beach is
22 available to come back tomorrow. I don't know how much
23 questioning --

24 MR. WEINER: She indicates she is, and hopefully we
25 can wrap up by 6:00, or if we don't, early tomorrow we can

1 wrap up.

2 THE COURT: All right. Very well. Thank you.

3 MR. WEINER: Dr. Beach, will you come forward,
4 please.

5 CHERYL BEACH, Ph.D

6 a witness herein, being first duly sworn, was examined and
7 testified as follows:

8 DIRECT EXAMINATION

9 BY MR. WEINER:

10 Q. Good afternoon, Doctor. Can you state your name and your
11 business address, please?

12 A. Cheryl Beach, and business address is 3001 Highland
13 Avenue, Cincinnati, Ohio, 45219.

14 Q. Where are you employed?

15 A. I'm self-employed in private practice in psychology.

16 Q. Can you discuss your educational background?

17 A. I have a Ph.D from the University of Wisconsin, and after
18 that, I did a postdoc fellowship with Elizabeth Bates at UC
19 San Diego. And after that, with experience working with
20 children and adults who have language impairment, I developed
21 an interest in getting more information about clinical work
22 with actual patients. So then I completed a second doctoral
23 level training program in clinical psych, and then did a
24 fellowship at Cincinnati Children's in the area of pediatric
25 psychology, with an emphasis on evaluation of learning

1 disabilities, and children that have a wide range of problems
2 that involve cognitive and academic processing.

3 Q. Did you prepare a curriculum vitae in connection with
4 this matter?

5 A. Yes.

6 Q. And at Exhibit 3 -- I'm sorry. Exhibit 63 of the larger
7 binder.

8 MR. WEINER: May I approach the witness, Your Honor?

9 THE COURT: Yes, you may.

10 Q. Is this a copy of your curriculum vitae?

11 A. Yes.

12 Q. And does that reflect your educational employment
13 history?

14 A. Yes.

15 Q. And does it also reflect your publications and
16 presentations?

17 A. Yeah. Publications are on there. Presentations are not
18 necessarily up to date.

19 Q. It's abridged?

20 A. Yeah. I don't always update.

21 Q. Could you discuss the nature of your current practice?

22 A. About half the work I do is evaluation, and the other
23 half is psychotherapy.

24 Q. What type of evaluations do you conduct?

25 A. Most of my referrals come from either psychology for

1 differential diagnosis, including ruling out a psychotic
2 disorder, differential with depression, anxiety, maybe more
3 severe disorders, and also learning and attention disorders.

4 And I also see people that are kind of on the extreme of
5 the spectrum, like sometime -- I recently evaluated somebody
6 with Down syndrome who is in a private high school and so has
7 not had IEPs, and -- but I also see a lot of people that are
8 very high functioning and have significant learning and
9 attention disorders. And I often assist with evaluating,
10 updating, evaluation, and either advising on learning
11 strategies, or submitting requests for accommodations for
12 things like professional and graduate admission or licensure.

13 I work with a lot of medical specialty boards; USMLE, bar
14 exam, CPA exam, so a number of that type of evaluation. I
15 also see a lot of people who are in eleventh or twelfth grade
16 preparing for the transition to the college setting, and they
17 often need an updated psychoeducational evaluation.

18 Q. So it's fair to say that some of your work is associated
19 with doing evaluations for people seeking accommodations on
20 high stakes exams?

21 A. Correct.

22 Q. And some of your evaluations are associated with people
23 who need learning strategies?

24 A. Right.

25 Q. And some of your evaluations are associated with

1 individuals who actually need some type of therapy treatment?

2 A. Uh-huh. Right. Or a psychiatry differential diagnosis.

3 Q. Does your practice entail evaluating individuals to
4 determine whether or not they have a disability under the
5 Americans with Disabilities Act?

6 A. Well, my job would be primarily to determine if there is
7 a disorder and a diagnosis, and then I might have an opinion
8 about disability, but that determination would ultimately be
9 made by the university they're going to attend, or the
10 licensing board, or, you know.

11 Q. In your practice, do you evaluate individuals for
12 suspected learning disability?

13 A. Yes, frequently.

14 Q. And in your practice, do you evaluate individuals with
15 suspected Attention Deficit Hyperactivity Disorder?

16 A. Yes.

17 Q. About how many individuals would you estimate you
18 evaluate on, let's say, an annual basis?

19 A. That's a little tough to call. An evaluation such as the
20 one we're talking here for Mr. Berger would take me a very
21 long time, but not all evaluations are that complicated. So I
22 would have to estimate between maybe 50 -- maybe 50 a year at
23 the present time.

24 Q. And over the course of your professional history, about
25 how many evaluations have you conducted?

1 A. Well over a thousand, and I think I would be safe in
2 ballparking it around 1,500, and that's because I'm old. No,
3 I've been doing it a while, yeah.

4 Q. In your curriculum vitae, there's a position that you had
5 with the medical school. Can you explain what that position
6 was?

7 A. Assistant dean of student affairs. And that included
8 looking after student well being in general.

9 Q. Which medical school?

10 A. University of Cincinnati, College of Medicine.

11 Q. And when did you hold that position?

12 A. I think starting in 2001, I think.

13 Q. How long did you hold that position?

14 A. Maybe four years.

15 Q. And what was your role in that position?

16 A. Organizing programs to make mental health services
17 available that were confidential for medical students, being
18 available for general counseling. But a large part of my role
19 was involved in assisting students with learning activities,
20 running a tutoring program. But also I developed and ran the
21 disability accommodations program, and reviewed -- that would
22 review the documentation for the students that were coming in
23 and requesting disability accommodations.

24 But I also met with every student that was preparing to
25 take Step 2 for at least an hour one time, and any student who

1 was close to the borderline in passing courses, I would meet
2 with frequently to make sure that they were okay with their
3 study and learning strategies.

4 And anybody that failed a board exam was also at great
5 risk for being dismissed, and so I would work very closely
6 with those students. And I also was available to help all the
7 students as needed with learning and study strategies for the
8 medical education curriculum.

9 Q. When you're conducting an evaluation and rendering a
10 diagnosis, on what criteria do you rely?

11 A. The DSM-V.

12 Q. Can you explain what that is?

13 A. It's a system of psychiatric diagnosis that is organized
14 into groupings, and it has -- each disorder has specific
15 criteria for making that diagnosis.

16 Q. Can you explain what a learning disability is?

17 A. It is an individual difference, neurological in origin.
18 Something about that individual that interferes with their
19 ability to learn specific skills that are essential for
20 academic learning, and it's something that persists despite
21 interventions. And it's in place even though this person's
22 had appropriate learning opportunities, and there's not --
23 there aren't other factors that are interfering with their
24 learning chances.

25 It's also something that's diagnosed under the current

1 system by a combination of scores from individual tests,
2 individual administered tests, that are substantially below
3 what is expected for their age, and a combination of that with
4 clinical observations, error patterns that are diagnostic, so
5 additional observations that come from a more qualitative
6 source.

7 Q. What are some of the features that exist for a learning
8 disability?

9 A. Well, to the present concern, dyslexia -- this is a
10 relatively recent revision to our system, and --

11 Q. One thing. You used the term "dyslexia." What is that?

12 A. Well, dyslexia is a type of learning disorder. It's
13 neurologically based, and it interferes with the learning of
14 phonological rules, as well as letter, sound correspondence,
15 and it is something that does persist into adulthood.

16 And what it basically does with adults is it makes it so
17 that the person is slower to identify words, and less accurate
18 in identifying words, and so it interferes with reading
19 comprehension by introducing errors, a higher error rate at
20 that kind of basic input level of word identification.

21 And it didn't used to be a term that was acceptable in
22 the diagnostic manuals. So in the DSM-IV, dyslexia did not
23 exist, technically. So a lot of clinicians would not seek to
24 use that as an official diagnosis because there wasn't one,
25 where now we have a way to build it in.

1 Q. And have you discussed all the features of a reading
2 learning disability, or a learning disorder in reading?

3 A. Not everybody has this lower level disruption to the rate
4 and accuracy of word identification. Some people
5 predominantly just have difficulty with organizing the
6 information and interpreting the meaning of what they're
7 reading.

8 Q. And is that a reading comprehension problem?

9 A. Yeah. So you could say that dyslexia is a subtype of
10 reading disorder; and, you know, it tends to generate a
11 problem very similar to the other one.

12 Q. Is reading fluency a feature of a learning disorder in
13 reading?

14 A. Reading disfluency, meaning -- what that means is that
15 the fluency refers to the rate and accuracy of reading. So if
16 you have a slower rate, and you're significantly less accurate
17 than most people, then you are disfluent.

18 Q. Is there a cure for learning disabilities?

19 A. No.

20 Q. How are learning disabilities addressed in an educational
21 setting?

22 A. There are different categories for clinical diagnosis or
23 identification of learning disability. So there are a variety
24 of kind of learning disabilities. It's a mixed group of
25 different kinds of disorders that affect different systems,

1 but the school categories and the clinical categories don't
2 necessarily line up.

3 Q. All right. How does one go about diagnosing a learning
4 disorder?

5 A. Individual assessment, and looking to see if there's
6 evidence of substantially lower scores than you're expecting
7 for that person given their age and the quality of their
8 learning opportunity. And you have to make sure that the
9 difficulties aren't due to other factors. Like if you have a
10 hearing impairment, and it interferes somehow with the
11 performance of communication, it doesn't mean you have a
12 learning disability due to that.

13 Q. You've said it that, in diagnosing a learning disability,
14 it's dependent upon scores. What are you referring to in
15 terms of scores?

16 A. Well, let me clean out my terminology, because I -- the
17 clinical term and the medical diagnosis is disorder. A
18 disability is a legal term that pertains to the functional
19 impact of something like a disorder or a condition. It's
20 causing an impairment that substantially limits your
21 functioning in major life activity areas, where a disorder
22 would mean that you have enough symptoms present that we would
23 say we're diagnosing a disorder. In the old version of our
24 diagnostic categories not too long ago, the diagnostic
25 criteria for learning disorder had to do with comparing like

1 an IQ score with a reading score, and how big -- if there was
2 a gap between them, how big that gap would be.

3 Under the new system we've gotten rid of that, and now we
4 say we are -- you're in the range of substantially lower than
5 we would expect for you. So the current clinical system is
6 more in line with the disability definition by law, but I do
7 need to be careful about how I'm speaking about it because
8 it's an area that clinicians often mishmash, as I think we've
9 seen.

10 Q. So my question is really directed to the scores. What
11 are you referring to when you're talking about scores? Scores
12 on what?

13 A. Tests of speaking, listening comprehension, reading,
14 writing, math.

15 Q. These are different assessments that psychologists
16 administer?

17 A. Yes.

18 Q. And what is Attention Deficit Hyperactivity Disorder?

19 A. That is a difficulty with sustaining concentration and
20 attention. There are a number of symptoms. We group them to
21 inattentive, as well as hyperactive, impulsive. Some people
22 have both. Some people have one and not the other so much.

23 And what we're saying is that the person has problems
24 with sustaining their concentration or their focus, and with
25 vulnerability to detail errors and other types of symptoms to

1 a greater extent or more frequently than the average person so
2 that it's actually causing -- it's interfering with their
3 functioning, and it's been present -- or evidence of that has
4 been present before the age of 12.

5 Q. When making a determination regarding accommodations on a
6 high stakes exam, what type of criteria do you use?

7 A. Say that again, please.

8 Q. When making a determination or a recommendation, perhaps,
9 what criteria do you use?

10 A. In formulating my recommendations, I would base that on a
11 combination of age norm-based test scores, consideration of a
12 detailed history, because I require, when I do this type of
13 evaluation, that I have extensive documented history, not just
14 patient self-report, and also clinical observations of -- that
15 are consistent with what the numbers are telling me. So you
16 develop a sense of, you know, what a disorder presents with.

17 Q. When making a recommendation regarding a disability for a
18 high stakes exam, what criteria do you use when making a
19 recommendation?

20 A. A combination of a review of the history, and clinical
21 observations, and test scores.

22 Q. And are your recommendations regarding high stakes exam,
23 do you consider the Americans with Disabilities Act?

24 A. Yes.

25 Q. And what is the definition of a disability under the

1 Americans with Disabilities Act?

2 A. Well, a person has a disability if they have a disorder
3 or some other condition that imposes a substantial limitation,
4 and it's interfering with their ability to perform -- it
5 affects major life activities, so meaning the ability to do
6 things that are very important for us in daily living, like
7 reading, concentrating, reading, et cetera.

8 Q. When did Mr. Berger first come to your attention?

9 A. He was referred by the University of Cincinnati
10 Disability Services Office.

11 Q. Why was he referred to you?

12 A. They contacted me because he was a student there that was
13 known to them, and he had previously requested MCAT
14 accommodations consistent with those that were granted at the
15 university, and the request had been denied, and they were
16 very concerned about that.

17 They told me that they felt that he really needed the
18 accommodations, and they were mystified as to why the denial.
19 They really didn't understand what that was. And they know
20 that I work with a lot of different boards, and they asked me
21 to look at the evaluation reports that have been completed,
22 and to read the denial letters, and to try to help them
23 understand why this might have been denied.

24 MR. BURGOYNE: Objection on that as hearsay, Your
25 Honor. I haven't said much today, but I ought to at least

1 point out the obvious.

2 THE COURT: Do you wish to respond?

3 MR. WEINER: No, Your Honor.

4 THE COURT: Okay. Sustained.

5 Q. When an individual comes to you requesting an evaluation
6 for accommodations, what's your approach with that?

7 A. Well, the first thing I want to know is is there previous
8 diagnosis of a disorder, and I want to know what the history
9 of disability determination and accommodation is.

10 Q. Do you make any promises or commitments to the
11 individuals who come to you seeking accommodations?

12 A. No, the reverse. If I -- I tell people up front that,
13 you know, first of all, determining who has a disability, I
14 can have an opinion but I don't make that decision. The
15 decision is made by the person or the people in charge of a
16 high stakes test, or university that might grant
17 accommodations, or law school. So that determination is up to
18 them, and so I don't have that power.

19 But also, I make it very clear that I make no guarantees
20 about the results of the evaluation, so you may or may not
21 like the findings that I have. I'm not -- I'm going to be
22 objective, and I'm going to give you my honest opinion; and,
23 you know, it may not be the opinion or the conclusion that you
24 are hoping for.

25 Q. When an individual comes to you seeking accommodations on

1 a high stakes exam, do you always recommend that
2 accommodations be provided?

3 A. No.

4 Q. When did Mr. Berger first come to you? Was it in the
5 2010?

6 A. Right. It was after the second denial of the MCAT
7 request.

8 Q. Did you conduct an evaluation?

9 A. I reviewed the information. I looked at the letters from
10 the denial, and I looked at the evaluation report. And
11 initially, I met with him and also his parents to get more
12 history and to learn a little bit more about the situation
13 before I knew that I wanted to do any action, you know. My
14 initial thing was to consult and just to say, you know, this
15 is the problem that I believe I see with your documentation.

16 Q. All right. Did, at some point in time, you conduct an
17 evaluation?

18 A. Just enough to -- mainly, my evaluation was I wanted to
19 collect documentation of the reported history to the greatest
20 extent that I could to verify what was there. And I wanted to
21 see the earlier evaluation reports. And then I administered a
22 couple of additional tests to have the opportunity for
23 clinical observation of his process during reading and some
24 other activities.

25 And in particular, I gave the Gray Oral Reading Test,

1 because Dr. Smith had already given a lot of tests, but what I
2 did not find in that report was much of a description of the
3 actual observation of what's happening when this person reads.
4 He gave the numbers. And so with Gray Oral Reading Test, it
5 gives me an opportunity to see for myself what's happening
6 when reading is going on.

7 Q. In 2010, when you met with Mr. Berger and administered
8 some of these assessments, did you prepare an evaluation
9 report to document the evaluation?

10 A. Yes, because one of the problems I saw with the previous
11 eval --

12 Q. I was just wondering if you prepared a report?

13 A. Oh, okay. Yes.

14 Q. If you'd turn to Exhibit 5 in the binder.

15 A. We're almost there. Hey, I've got an idea. What we need
16 is an iPad, you know, so you could swipe.

17 Q. Note to self. Make two binders next time.

18 A. Good idea, or four. I'm there.

19 Q. Is that a copy of your evaluation report from 2010?

20 A. Yes.

21 Q. In conducting an evaluation, or in conducting
22 Mr. Berger's evaluation, did you take a history?

23 A. Yes.

24 Q. Did you administer assessments?

25 A. Yes.

1 Q. And did you make observations?

2 A. Yes.

3 Q. And did you document all those in this 2010 evaluation
4 report?

5 A. Yes.

6 Q. Your history, what is the source of your history?

7 A. Careful in-depth interview with the patient.

8 Q. In this case, whom did you interview? Who was present at
9 the interview?

10 A. Mr. Berger. I also interviewed both parents.

11 Q. All right. Continue on with the history.

12 A. Yeah. And so in this case, I don't recall if I went
13 beyond that. I know I did talk with disability services at
14 his university and got their impressions, which gives me good
15 information. And in many cases, I would go beyond that, like
16 if somebody was actively in school, or something like that, I
17 would try to talk to teachers. But in this case, I talked to
18 him, his parents, and the university.

19 Q. In Mr. Berger's case, what other sources of history did
20 you have?

21 A. I had Dr. Smith's two reports from 2010.

22 Q. So did you review documents as part of your history?

23 A. Yes. I requested that after the interview, and saying,
24 you know, what is the history here pertinent to disability,
25 you know. I asked that these documents be gathered up for me.

1 Q. And there's a list of documents on PX12?

2 A. Yes.

3 Q. Is that a copy of the documents that you reviewed?

4 A. Yes.

5 Q. And did you feel that you had a thorough history after
6 reviewing those documents and speaking with Mr. Berger, his
7 parents, and the school disability services?

8 A. Yes.

9 Q. Can you go through what Mr. Berger's history was?

10 A. Oh, can I add one more person?

11 Q. Yes.

12 A. I also spoke to Dr. Alexander Smith, just to talk with
13 him.

14 Q. So what was Mr. Berger's relevant history?

15 A. I was told that he was diagnosed with -- that he had a
16 history from the beginning of academic education of delays in
17 learning early literacy skills. But let me back up and say
18 that he also had a number of characteristics of his early
19 development that are -- place him at risk for a learning
20 disability.

21 So he was born prematurely. He weighed three pounds,
22 twelve ounces, something like that, so low birth weight. He
23 had a cerebral hemorrhage. Spent six weeks in the NICU,
24 Neonatal Intensive Care Unit, before going home, and had
25 delayed onset of spoken communication language until age

1 three. So those are risk factors.

2 And then when he went to -- he was in kindergarten, he
3 had a remarkable difficulty with learning and retaining early
4 decoding skills, and letter and number writing skills,
5 including some diagnostic features like mirror writing, letter
6 reversals, not remembering the letter and making up a symbol,
7 so some of the signs that I would expect to see during early
8 childhood that would suggest a learning disorder.

9 It was severe enough the parents considered placing him
10 at a specialized school that does individualized educational
11 plans for severe learning disorders. That's the Springer
12 school. Instead, because his mother was a licensed teacher,
13 they determined that she would educate him at home and give
14 very intensive, phonological instruction in early reading and
15 writing.

16 Then he went back to the -- a private school, where an
17 IEP is not needed, and it's a smaller class size so the
18 teachers communicate with parents and one another. And he was
19 provided with a high quality learning opportunity, and also
20 with a flexible responsive learning setting. So he was
21 accommodated through there, and then continued through high
22 school.

23 Q. What continued through high school?

24 A. Accommodation.

25 Q. Okay.

1 A. Extended test time.

2 Q. Did you also review prior evaluations?

3 A. Yes.

4 Q. And what evaluations had you reviewed?

5 A. I looked at the speech and language evaluation from '92,
6 and I looked at the psychological eval from '94 that was done
7 by Dr. Artner. That had a lot of very informative
8 information. And then there was a gap in time where he was
9 not individually evaluated for a long time, until he was in
10 the eleventh grade of high school. So there was quite a gap
11 there. And then I looked at that report, and then the two
12 that were done during college.

13 Q. You mentioned that the '94 report from Dr. Artner was
14 very informative in what way?

15 A. That's the -- well, that's a report where, in my opinion,
16 dyslexia was diagnosed and ADD was also diagnosed. And in the
17 old days, it wasn't always done that people explicitly listed
18 a DSM diagnosis like we do in current year. A lot of times
19 people avoided terms like disability and disorder, and they
20 said challenges, and they kind of put things between the
21 lines. So if you look at that report --

22 Q. Well, can you go to that report --

23 A. Yeah. Where is it?

24 Q. -- and then point out what you're --

25 A. I'll show you what I'm talking about.

1 Q. What was informative?

2 A. Also during my history taking with parents, Mrs. Berger
3 told me that her son was diagnosed with dyslexia in second
4 grade as a result of that evaluation, and that was the point
5 at which -- at the end of second grade, second half of second
6 grade, you really are trying to figure out if there's a
7 learning disorder, because by third grade there's another
8 level of expectation of fluency. So that's another reason
9 that that report is important.

10 Okay. I forgot where am I going.

11 Q. Exhibit 17.

12 A. Oh, okay. Takes me so long, I forget where I'm going. A
13 couple of things I remember right off the top of my head, like
14 even the reason for referral on the first page, it says to
15 determine if dyslexia or some other specific problem is the
16 reason for his trouble with reading. So that's the reason for
17 the evaluation.

18 And Dr. Artner also points out, if I could find it here,
19 test scores -- oh, here we go. She also points out that there
20 are -- so harking back to the DSM-IV and the diagnostic
21 criteria for a learning disorder or reading disorder, that
22 there were several achievement scores that were two or more
23 standard deviations below measure of general intelligence,
24 which would have been a diagnostic sign. And those include
25 word identification, passage comprehension, calculation, which

1 is written math with numerals, as opposed to looking at
2 pictures and counting. His score for that was extremely high
3 for applied math. And spelling was another area. And so
4 that's a way of saying this is a significant issue.

5 Q. Did Dr. Artner, in her report, make any particular
6 recommendations which were of note to you?

7 A. Yes.

8 Q. What were they?

9 A. Oh, yeah, I think also the coding might have been at the
10 16th or 25th percentiles.

11 Q. What is coding?

12 A. It's a symbol copying task that is time limited, and low
13 scores on that can be associated with dyslexia or other slow
14 processing speed related problems. I'm looking for --

15 Q. We're discussing what recommendations Dr. Artner meant.

16 A. Yes. Somewhere in here too she says that the pattern of
17 performance, you know, could be considered indicative of a
18 learning disability. But it's important to note that people
19 stay in their lane, you know, so that the school -- the public
20 school that he was in -- Dr. Artner was a private practice
21 person. She's not going to tell the school there's a
22 disability, but she's going to suggest that they take a look
23 at it in that way.

24 And in the recommendations, another note is that the
25 projective also show some anxiety around learning. Here we

1 go. So when she talks about specific deficits involving
2 reading, and gives examples of like the mirror writing and the
3 backwards letters and so forth, she said that in spelling a
4 word it took an extreme amount of time and effort to even
5 write like two or three letters. What she's doing is she's
6 saying the symptoms are here.

7 And then in the recommendations, under Roman Numeral II,
8 she's saying that the parents are advised to stress a phonics
9 approach in reading, and site words should be imprinted by
10 using a multisensory technique. So that's a way of saying to
11 provide a specific intervention, like Orton Gillingham, and
12 that would be used, you know, for a reading disorder with
13 dyslexia. So she's describing many of the signs, and then
14 she's prescribing the recommendation.

15 Q. And where you were just reading from, is that on page
16 PX251?

17 A. Yes.

18 Q. And a phonics-based approach, is that a research-based
19 approach?

20 A. Yes.

21 Q. What is that research-based approach used for?

22 A. It's especially effective for teaching people reading
23 skills who have a problem like dyslexia, where they are less
24 intuitive in learning some of the patterns of letter sound
25 correspondence and the combination, including the higher level

1 phonological rules.

2 And then for Roman Numeral III, you know, she also said
3 in here that his -- if you want me to find it, I can find it,
4 but basically she says his most defining characteristic is his
5 distractibility. And she talks about how he has very slow
6 processing speed, he loses his focus, he's easily frustrated.
7 He was very frustrated with reading especially, but he had
8 difficulty with multistep instructions. I want to find it and
9 not just keep talking and not find it.

10 I'm on page PX249, which is page 3 of the test report.
11 "It was hard to keep Brendan on task." Partway through the
12 test he jumped up from the couch, et cetera, so he's getting
13 up and down. He's having a hard time staying seated. He's
14 talking about other things, he's off task, and he appears to
15 be unaware of that, that his off task behavior is
16 inappropriate. Seemed that -- and I'm quoting, It definitely
17 seemed that he had to immediately yield to his inner
18 distractions and impulses.

19 Q. In terms of other documentation that you reviewed, was
20 there anything else in Mr. Berger's history which was
21 significant to you?

22 A. There is Roman Numeral III, under recommendations. So
23 even though there's not a DSM-IV diagnosis with numbers and
24 official labels, what it says here is that if the parent has
25 noticed the uneven attention and distractibility, and these

1 have interfered with learning, then the psychologist is
2 recommending they discuss this with their physician, and at
3 that time, the physician may advise a brief trial on a
4 medication to learn if this would be one means of promoting
5 concentration and task completion. Reading material about ADD
6 and medical treatment plans for ADD were provided.

7 So that is a way of staying in your lane and saying let's
8 let the pediatrician make the diagnosis, but I'm saying it's a
9 diagnosis.

10 Q. Other than Dr. Artner --

11 A. My opinion.

12 Q. Other than Dr. Artner's report, was there anything in the
13 documentation that you reviewed which was also significant in
14 terms of Mr. Berger's history?

15 A. The evaluation from Dr. Smith in 2003. Basically, he
16 is -- he gave -- he only gave extended time academic tests,
17 and he --

18 Q. I'm not sure what you mean by that. Can you explain what
19 "extended time academic tests" mean?

20 A. He gave a particular test that does not have a time limit
21 for the response.

22 Q. Which test would that be?

23 A. The Wechsler Individual Achievement Test.

24 Q. Okay.

25 A. And that test, as would be expected, without a time

1 limit, he was able to do quite well on, and he earned some
2 very strong scores.

3 At that time, I'm not looking at it right now, but I
4 believe that was eleventh grade, right? Can you tell me where
5 that evaluation is?

6 Q. Okay. Perhaps Exhibit 29, is that the one you're
7 referring to?

8 A. Actually, it's 23. So he gave a Wechsler Adult
9 Intelligence Scale and the achievement test I mentioned, and
10 this was the one that was completed when he was in the
11 eleventh grade of high school. And so one of the things that
12 I noticed in looking at that is he continues -- with the WAIS
13 III, he continues to have a low score for coding, and also his
14 score for digit span as well.

15 So his achievement scores are at or above average with
16 extended time and conceptual -- most of the conceptual tests
17 from the WAIS are quite high, meaning a high level of
18 cognitive ability.

19 Q. When you conducted your evaluation in 2010, did you make
20 any inquiry as to what the primary language was in the
21 household?

22 A. Yes. I always do.

23 Q. And what had you concluded?

24 A. I was told that English was the language in the home, and
25 that Brendan was a native speaker of English.

1 Q. And if you look at the PX16 of Exhibit 5.

2 Is the source of Mr. Berger's language background located
3 on that page?

4 A. Yes. It's the first sentence in psychosocial history.

5 Q. And what did you write?

6 A. "Mr. Berger grew up in a family with English as the
7 primary language, and he speaks English fluently."

8 Q. And what was the source of this information?

9 A. Parents.

10 Q. And you had spoken with both parents?

11 A. Right.

12 Q. Did you conduct any assessments during the 2010
13 evaluation?

14 A. Yes.

15 Q. What assessments did you perform yourself?

16 A. The Gray Oral Reading Test, Fourth Edition, and the
17 Nelson-Denny Reading Test. Dr. Smith had previously
18 administered the extended time version of that test. In
19 response, he was responding to the denial of the first MCAT
20 accommodations request, and it had been recommended that he
21 might administer the Nelson-Denny. And his interpretation of
22 that was to give the extended time version.

23 So I gave its companion, which is a shorter time limited
24 version of that test, the point being that they can be
25 compared, and a brief test from the Wechsler Memory Scale, and

1 the Millon, which is a psychological assessment, because the
2 assessment by Dr. Smith had not really looked at psychological
3 percentile like anxiety, depression, and those are things that
4 have to be ruled out as explanations for learning issues. So
5 two of those were given.

6 Q. And did you administer the assessments yourself?

7 A. Yes.

8 Q. And why did you administer them yourself?

9 A. Because I needed to have an understanding directly, with
10 my own clinical observation of the process of performing these
11 types of activities, especially reading, because the diagnosis
12 of a learning disorder does depend on the test score, but also
13 it depends on other characteristics of the person, including
14 the type of error and the type of difficulty that I can
15 observe.

16 Q. Can you discuss the importance of the clinical evaluation
17 in connection with learning disabilities and/or ADHD?

18 A. It's essential to -- for me to not just have someone tell
19 me what's going on with them, and then I write it down and say
20 oh, okay, fine. I really want to have some evidence that
21 comes from my own eyes and an analysis there, but I want to
22 see the person do it.

23 Q. Is it appropriate to make a diagnosis of either a
24 learning disability or ADHD without having conducted a
25 clinical evaluation?

1 A. I would not do it.

2 Q. Is it appropriate to rule out a diagnosis of learning
3 disability or ADHD with a clinical evaluation?

4 A. No.

5 Q. Let's discuss the results of the evaluation you
6 performed. So what was the first assessment that you
7 performed?

8 A. The Wechsler Memory Scale, Third Edition, the mental
9 control subtest. It's kind of a mental status exam. It
10 involves attention, concentration, a certain amount of
11 executive percentile. It's sort of a broad assessment of
12 those factors, and processing speed comes into play, as well
13 as working memory.

14 Q. What were the results of that assessment?

15 A. The score is fairly low.

16 Q. Can you go through those scores?

17 A. Yeah. It's at the fifth percentile for that subtest.

18 Q. And what is the significance of that?

19 A. It is what I would call substantially low. And to me
20 that is a measure or a sign of the kind of difficulty with
21 working memory and sustained concentration that gets mentioned
22 in the previous evaluation reports; for example, Dr. Smith
23 refers to this, but he stays in his lane, and he doesn't
24 diagnose an attention disorder but he says, hey, I see a lot
25 of symptoms but I'm stopping short of that, he should see a

1 neuropsychologist. So that is something I wanted to check out
2 for myself.

3 Q. And you also administer the Woodcock-Johnson Test of
4 Cognitive Ability?

5 A. Yeah, cognitive and achievement. This is the Woodcock
6 III.

7 Q. Did you administer the entire test, or just selected
8 subtests?

9 A. No, just selected subtests because Dr. Smith had
10 administered other things.

11 Q. Did you administer any of the same assessments that
12 Dr. Smith had done?

13 A. Not during this evaluation, no.

14 Q. Why is that?

15 A. I don't want to administer anything that's been given
16 within the last year because of a practice effect.

17 Q. So Dr. Smith's evaluation that you were talking about was
18 this 2010 evaluation?

19 A. Yes.

20 Q. And you administered this evaluation?

21 A. In 2010 also.

22 Q. So it was several months after his?

23 A. Right, right, right.

24 Q. And so you didn't administer any of the identical tests?

25 A. No.

1 Q. What's the problem with administering identical tests?

2 A. The person might remember some of the content of that
3 test. It might make them work faster. It might mean that --
4 like let's say that you had a math problem, and you had a lot
5 of difficulty solving it but you eventually got the right
6 answer. A few months later, if I give you the exact same math
7 problem, you might remember it and just go boom boom boom.

8 Q. And that would impact the ultimate results?

9 A. Yeah. It would compromise my ability to measure what I'm
10 trying to measure.

11 Q. The assessment -- which assessments were subtests of the
12 Woodcock Johnson that you administered?

13 A. Spelling of sounds, because word attack and other
14 decoding-type tests had already been done, and I wanted to
15 have my own picture of difficulty with phonological analysis.
16 So this is a test where a fake word, a made-up word, is given
17 to you, and then you write down how you think it should be
18 spelled using the rules of English spelling.

19 Q. And on PX37 of Exhibit 5, is that where you report the
20 results of the spelling sounds?

21 A. Right. That came in at the tenth percentile. What I
22 recall is that he made some diagnostically classic kinds of
23 errors, even with like consonant sounds, as well as long,
24 short vowels. And those are atypical for adults, unless they
25 have a dyslexic type of reading disorder.

1 Q. What does tenth percentile mean?

2 A. That means that he was higher than ten percent of people,
3 so at the bottom ten percent, you could say.

4 Q. And rapid picture naming, what does that assessment
5 entail?

6 A. That's a measure of processing speed. And it has to do
7 with memory retrieval fluency for something that we would call
8 overlearned, so it's not a difficult task. These are really
9 simple pictures of everyday objects that you name, and I'm
10 measuring how many of those you can name in a set time limit.
11 And it has to do with when I look at a picture, how quickly
12 can I pull up the word that goes with that picture. So it's a
13 measure of automaticity and processing speed.

14 Q. And how did Mr. Berger perform on that?

15 A. Extremely low.

16 Q. You also administered tests of achievement?

17 A. The Gray Oral Reading Test, Fourth Edition.

18 Q. What is the Gray Oral Reading Test?

19 A. This is a test where you read a paragraph out loud to me,
20 and while you're reading, I'm recording the time it takes you
21 to read that paragraph, and I'm marking errors on a scoring
22 sheet. So if you misidentify a word, you misread it, you omit
23 it, you put in a word that doesn't belong there, I'm going to
24 mark these little errors that occur at this lower level of
25 reading.

1 Then what I do is take -- you read it one time only, and
2 then I take it away so you can't look back, and then I give
3 you multiple choice questions on that material, but for this
4 version of the test, you are allowed to see the questions, and
5 then I read them out loud to you, and then you tell me your
6 answer.

7 And the passages are of increasing difficulty as we go
8 along, and the idea is to continue until you reach a ceiling
9 of ability for a person.

10 Q. Why did you feel it was important to administer the Gray
11 Oral Reading Test?

12 A. I wouldn't use it as my only assessment of reading
13 because you are reading out loud and that may not be something
14 that you do, although I have observed that
15 Mr. Berger typically does whisper to himself when he's
16 reading.

17 Q. Reading silently?

18 A. Yeah. It's just an observation; but, you know, in this
19 case, it gives me more of a window into the reading process
20 and whether certain kinds of errors are occurring. And then I
21 can compare the performance of that individual with norms that
22 are based on a large number of other people of similar age to
23 determine whether or not their performance is consistent with
24 what is typical or deviant.

25 Q. In administering the Gray Oral Reading Test, are you able

1 to observe the condition and manner in which the -- or in this
2 case, Mr. Berger, was reading?

3 A. Yes, I can observe the behavior better than if they are
4 reading silently, because then I'm speculating about what's
5 going on there.

6 Q. What kind of observations did you make about Mr. Berger's
7 reading when you administered the Gray Oral Reading Test?

8 A. There were a lot of hesitations before very simple words
9 that would be automatic site words for most adults. His
10 reading is much less automatic, much less accurate for word
11 reading. And several words were misidentified. He made
12 errors with syntactic or morphological markers, as well as
13 word omissions or insertions, or he might substitute an
14 orthographically similar word, like a word with similar
15 spelling. So if you see the word whether, w-h-e-t-h-e-r, and
16 you're reading along and you say "whoever" and you get that
17 word wrong. They had some similarity. Your comprehension,
18 it's sort of evolving as you're going along, just gets
19 completely derailed.

20 And then you have to halt, and you have to go back and
21 then reread words or reread phrases, or even larger units of
22 text just to kind of proceed, and that's what he did is he
23 repeated a lot of words and just made a lot of errors at that
24 level.

25 Q. And what were the results of the Gray Oral Reading Test?

1 A. His reading rate, because when you have to keep going --
2 when you keep hesitating before reading a word, or you have to
3 keep going back to revise it or reread a phrase, that slows
4 you down. And so his rate was slow. And it was slow because
5 his word reading accuracy was very slow.

6 And in looking at the comprehension, so you can't look
7 back at the passage, but you can look at the questions, he was
8 incredibly slow at answering the questions.

9 Q. What was his score on the reading rate?

10 A. Reading rate, first percentile.

11 Q. Did you also measure reading accuracy?

12 A. First percentile, so bottom one percent.

13 Q. And reading fluency?

14 A. That's a combination of those two scores and, again, you
15 know, first percentile.

16 Q. And how about his reading comprehension?

17 A. That was a little higher. It's in the lower end of the
18 average range, at the 37th, so higher than 37 percent of
19 people. And what I can tell you about that is that he was
20 spending an awful lot of time kind of reading the
21 alternatives, and then trying to logically reason about what
22 is probably the best answer. So it was very inconsistent
23 accuracy, and very slow.

24 Q. And that was something you had observed?

25 A. Yes.

1 Q. And what is the oral reading quotient?

2 A. That's a summary score taken over all of the subscores.

3 Q. And where did that fall at?

4 A. Second percentile.

5 Q. And what norm is this based on?

6 A. That's a good question. So this is a previous version of
7 this test. The current one has -- goes up to higher ages. So
8 this test has age-based norms going up to age 18. So at that
9 point in time, then that's all we had. So one common
10 procedure is to use the age norms for, say, age 18 or, you
11 know, the highest level, and to have that be representative of
12 the typical adult.

13 Q. Is there anything in the instruction manual for the Gray
14 Oral Reading Test which prohibits you from administering the
15 GORT to someone who is older than age 18?

16 A. No.

17 Q. And so in scoring this assessment, you were comparing
18 Mr. Berger at that time to 18-year-olds?

19 A. Yeah, because that would be representative of the average
20 adult or high school graduate. And it's a similar process to
21 what is used with the Nelson-Denny, and say, for example, the
22 LSAC uses that kind of a technique for looking at reading
23 performance with people requesting accommodations for the
24 LSAT.

25 Q. Did you administer any assessments of silent reading in

1 your 2010 evaluation?

2 A. No. Oh, wait. Did I? Yes, I did. Sorry. I had to
3 turn the page. I did do the Nelson-Denny, and I did the --
4 the scores for that are on PX39. And the italics are the
5 score results from Dr. Alexander Smith earlier in the year,
6 and that was the extended time version.

7 Q. So can you describe how the Nelson-Denny Reading Test is
8 administered?

9 A. It's another test where you read a passage and then
10 answer comprehension questions. These passages are a little
11 longer than the Gray Oral. And when you're answering the
12 questions, you read the passage silently, and then the
13 questions are below. And while you're answering the
14 questions, you can look back at the passage to find the
15 answers, where with the Gray Oral, you can't look back.

16 Q. All right. So in the one format, it's administered under
17 a standard time?

18 A. Yes. And that's 20 minutes.

19 Q. And did you administer that version?

20 A. I did.

21 Q. And what was Mr. Berger's results?

22 A. First percentile on reading rate and comprehension.

23 Q. Okay. And just so we're clear on this, how is the
24 reading rate measured?

25 A. So for this test, what you're doing is silent reading,

1 and I have a stopwatch. And when exactly one minute is gone,
2 I ask you to take note of where you were in your silent
3 reading and to code that over here on the side of your test
4 response sheet. And then there are norms where I look up
5 where you were at at that moment. So it's basically measuring
6 how many words you read per minute.

7 Q. And it just measures the first minute?

8 A. Right.

9 Q. The comprehension, however, that's over the entire
10 assessment?

11 A. Yes.

12 Q. And from your recollection, did Mr. Berger complete that
13 assessment in 20 minutes?

14 A. You mean all of the test questions?

15 Q. Yes.

16 A. No.

17 Q. On the extended version, that was administered by
18 Dr. Smith?

19 A. Right.

20 Q. And how much time is the extended version time?

21 A. Thirty-two minutes, so it's kind of like time and a half.

22 Q. So I've noticed yours says Form H, and Dr. Smith's
23 indicates Form G. Are those two different assessments?

24 A. They're two different assessments, meaning they have
25 different passages and different questions --

1 Q. Yes.

2 A. -- but they are statistically designed and studied to
3 make sure that they are equivalent in difficulty and other
4 properties.

5 Q. After conducting your evaluation, which included your
6 history, your review of documentation, and administration of
7 assessments, had you drawn any conclusions regarding
8 Mr. Berger?

9 A. Yes. It was my impression that he presented as a
10 classic, a higher IQ individual who has dyslexia and maybe
11 some ADD, but I didn't really have data to be conclusive on
12 that.

13 Q. All right. Did you make a diagnosis?

14 A. Yes. It's on page PX33.

15 Q. And what was your diagnosis?

16 A. Reading disorder, and disorder of written expression.

17 Q. And is your diagnosis consistent with the DSM -- was it
18 the DSM-IV or DSM-V?

19 A. This would have been the DSM-IV criteria.

20 Q. So was it consistent with the DSM-IV criteria?

21 A. Yes.

22 Q. Can you explain how it's consistent with the DSM-IV
23 criteria?

24 A. Discrepancy scores between the IQ score and these reading
25 scores would have been significant, but I would not say that

1 would be my number one factor I would be looking for, but more
2 a characteristic pattern of errors, evidence is this problem
3 persisting back into early childhood with less automatic and
4 less accurate word reading and an impact on comprehension.

5 Q. And do you state how Mr. Berger meets the DSM-IV criteria
6 for a reading disorder at PX29 and PX30?

7 A. Yes. Actually, that's like a paraphrase summary of the
8 diagnostic criteria.

9 Q. And with respect to the diagnosis of a written order
10 disorder, did you state how that diagnosis was made in
11 connection with respect to the DSM-IV?

12 A. Yes.

13 Q. And that's at PX30?

14 A. Right.

15 Q. And what recommendations did you make?

16 A. Extended time for the MCAT was recommended, and a
17 rationale for why that recommendation was given. My
18 recommendation was for double the standard time. People don't
19 always request what I recommend, but that's my opinion. And I
20 believe he requested time and a half, I don't recall, but I
21 recommended double time because of the intensity of the
22 problem.

23 I also recommended rest breaks, additional rest breaks,
24 and distribution of the long exam over two days 'time to
25 offset fatigue, which is another factor that can really affect

1 his reading rate and accuracy. It kind of compounds over the
2 course of a long day. Also recommended this for medical
3 school courses.

4 Q. And are your recommendations listed at PX33 through PX36?

5 A. Yes. Oh, yes, distraction-limited room for tests.

6 Q. When conducting an evaluation, do you try to make some
7 assessment of the individual's either vigilance or motivation?

8 A. Oh, yes. That's another part of wanting to see for
9 myself what the presentation is.

10 THE COURT: I'm sorry. Can you repeat that? I just
11 missed it. I was writing. Your last question.

12 Q. My last question was do you try to make some assessment
13 of the individual's vigilance or motivation?

14 A. Yes, it's very important to have a direct impression of
15 that, and I have a lot of clinical experience to guide me on
16 that, but I did not give a specific test to try to evaluate
17 that.

18 Q. Does the NBME require that you administer any type of
19 specific test of vigilance or motivation?

20 A. Like Noll and Green, or --

21 Q. Yes.

22 A. Not to my knowledge, but I think it would be good for me
23 to include that in a test battery just to do it, you know, so
24 I have something objective beyond my own impression.

25 Q. Did you make any type of assessment for the 2010

1 evaluation whether or not Mr. Berger was being vigilant or
2 demonstrating motivation with respect to the test?

3 A. He appeared to me to be working very hard to do his best,
4 and it was my impression that he's the real deal.

5 Q. What made you come to that conclusion?

6 A. A high level of effort, and it's very hard to fake the
7 amount of time, effort, and frustration that he experiences
8 when completing the reading activities that I observed.

9 Q. Did you also conduct an evaluation in 2013?

10 A. Yes.

11 Q. Were there any differences or updates to Mr. Berger's
12 history from your 2010 evaluation?

13 A. Oh, I should -- should I say something about the
14 assisting him with putting together history documents?

15 Q. I'll ask you that question later.

16 A. Oh, okay. Because that's a part of the process. Yeah,
17 he had been denied MCAT accommodations. Apparently, he had
18 taken the MCAT again and gone to medical school, and was in
19 the process of looking at Step 1 and requesting accommodations
20 for Step 1.

21 Q. Since you brought up the documentation, did you assist
22 Mr. Berger in putting together documentation associated with
23 his request for accommodations for the MCATs?

24 A. Yes. I always do that for this type of test. I will go
25 online, I will look up the documentations for whatever test

1 the person might request accommodations for. I always look
2 that up, and I follow it very carefully, because I understand
3 why that information is important to the people that will
4 review the request. And if you do not provide them with the
5 information they need, they cannot review your request. And I
6 find that a lot of people that I am working with in this
7 regard are not always as aware of the importance, you know.
8 Like if it says that an official transcript is required from
9 high school, that's what that means, you know. Don't just
10 say, oh, here's a copy of one from somewhere, I'll download it
11 off the web, you know.

12 And so what I'm saying is that I take that very
13 seriously, and I also want to see it for myself. So if I say
14 bring me a letter from your teacher, I would like that
15 notarized.

16 Q. Did you assist Mr. Berger in getting earlier letters
17 from St. Gabriel's?

18 A. I directed him what material to try to get. Back in the
19 day, especially in the private schools, there was --

20 Q. I'm just wondering about Mr. Berger. Did you --

21 A. Well, I'm just saying, you know, a lot of times there was
22 not a written record, but what I said was try to get a written
23 record of the service plan, and if you can't do that, see if
24 there's still a teacher there that you know that can, you
25 know, do something to attest to that for you.

1 Q. Did the teacher at St. Gabriel send you a draft letter
2 ahead of time? Mr. Berger had a draft letter in his file.

3 A. What I recall is that -- and I'm going on my
4 recollection, but what I recall is that the teacher had
5 retired, had prepared a letter but was retired and didn't have
6 school letterhead and whatnot. And so there was a lag time
7 between I wrote this letter, but I need to get to the school
8 and put it on official letterhead. But at the time, also I
9 was writing the report, and I wanted to know what was he
10 granted, you know, so it's possible they sent me one ahead of
11 time.

12 Q. And did you contact the individual, I believe it was
13 Ms. Kagy, at Moeller school?

14 A. No. No, I just wanted to know so I could put it in my
15 report, but I find that it's very important to be accurate
16 about these things, and to have as official -- I want a
17 verification, not just a self-report.

18 Q. For the 2013 evaluation, did you administer assessments?

19 A. I did.

20 Q. Did you administer them yourself?

21 A. Yes.

22 Q. And what assessments did you administer?

23 A. You want me to read them?

24 Q. Yes, please.

25 A. Bender Gestalt Test, Second Edition.

1 Q. Just so we can inform the Court, you're reading from
2 Exhibit 6 at PX42?

3 A. Yes.

4 Q. Okay.

5 A. Bender Gestalt Test, Second Edition. Wechsler Adult
6 Intelligence Scale, Fourth Edition. Wechsler Memory Scale,
7 Fourth Edition. Woodcock-Johnson III, Normative Update 3.0.,
8 Tests of Cognitive Abilities and Achievement. Scholastic
9 Aptitude Test For Adults. Behavior Rating Inventory For
10 Executive Functioning, Adult Form, Self-Report. Brown
11 Attention Deficit Disorder Scales, Adult, History and
12 Diagnostic Form, and also the Attention Deficit Disorder
13 Scales. So I did a clinical interview self-report and also
14 had collateral respondents.

15 Q. And what's the importance of doing that collateral
16 respondents?

17 A. Again, you don't want to just have the patient
18 self-report. Someone could take a self-report rating scale
19 for their attention problems and just rate everything as
20 extremely high, and then I'm just taking one person's word for
21 it. So I had an instructor from the medical school complete
22 that as well, based on the instructor's observations of him in
23 the classroom and his learning.

24 Q. And is that practice consistent with DSM practices?

25 A. Yes. I would say it's not always done, especially for

1 adults, but I think it's important.

2 Q. It's the best practices in neuropsychology --

3 A. That's what I would say, right.

4 Q. Let me finish my question. Is that the best practices in
5 the area of psychology?

6 A. Yes.

7 Q. And what were the results of Mr. Berger's assessments in
8 2013?

9 A. There's more tests. Do you want me to keep reading them?

10 Q. Are they listed there on PX42?

11 A. Yes.

12 Q. So why don't we go through the results. You indicated
13 that there was the Wechsler. What is the Wechsler?

14 A. It is a test of cognitive and intellectual ability.

15 Q. And what results did you find?

16 A. The results?

17 Q. They're on PX123.

18 A. Okay. Consistent with previous assessment, very high
19 level of verbal conceptual knowledge and reasoning. Verbal
20 comprehension index at the 99th percentile, higher than 99
21 percent of people. Perceptual reasoning index is at the 97th
22 percentile. And within those areas, his abilities are fairly
23 evenly developed. He did lose points for some of the
24 perceptual reasoning tests due to slow processing speed.
25 Those scores are significantly higher than measures of

1 auditory and visual attention, working memory, and processing
2 speed. And those are very low and at the ninth and second
3 percentile.

4 Q. All right. What is processing speed?

5 A. Well, in this case, it's measuring the rate of speed for
6 symbol processing, so symbol scanning or copying. So if
7 there -- do you want me to describe it?

8 Q. Sure.

9 A. If there is a row of numbers across the top of a page,
10 and each number has a little mark that goes with it, a
11 different mark, down here you're given squares that have the
12 numbers, and your job is to fill in the mark that goes with
13 each number. And then we time you to see how many of those
14 you can complete in a set period of time.

15 Q. And that's the simple search?

16 A. That is coding. So you're writing symbols, and you're
17 scanning and associating them with a number, and then
18 remembering it, bringing it down and writing it.

19 Q. And that's a timed assessment?

20 A. Correct.

21 Q. Does that have any relevance with respect to Mr. Berger's
22 reading?

23 A. It's always been one of his lowest test scores, and low
24 scores on that are associated with dyslexia, but it doesn't
25 mean that you automatically have dyslexia if you have a low

1 score for that.

2 Q. Okay. On the next page, PX124 is your report on the
3 Wechsler Memory Scale?

4 A. Yeah. Can I note one more thing about --

5 Q. Yes. Please.

6 A. I didn't mention this before, but in the original
7 assessment back by Dr. Artner back in '94, she did not report
8 a working memory index, but the two subtests that are used to
9 compute it were, by my interpretation what she said, around
10 the 25th percentile. And then when Dr. Smith evaluated in
11 2003, there's like a 38 point increase in that index to 128,
12 and so that doesn't usually happen.

13 So I don't know if that was an error recording the test
14 score, or if that was a strategy that really worked, or, you
15 know, I don't have an explanation for that, but these scores
16 are back down in a range of the previous assessment, even
17 though it was very long ago.

18 Q. And so if we go to the Wechsler Memory Scale.

19 A. Yes.

20 Q. What was significant about the results on this
21 assessment?

22 A. I'm thinking how best to summarize. That he showed a
23 stronger ability for a more factual kind of memory activity,
24 where you're pairing two things together, but there were
25 significant limitations in the accuracy and consistency

1 during -- if he's listening to a story, so logical memory. I
2 read you a story. Then when I'm done reading the story, I
3 say, all right, now tell it back to me as best you can, you
4 know, and try to get the details. Then I'm counting, you
5 know, how many bullets or how many details he recalled from
6 that story.

7 And he showed a pattern of performance that is typical
8 for ADD, with involuntary fluctuations of attention, so he
9 would get a chunk of material, and there would be a gap, and
10 then a chunk, and then a gap, so sort of an intermittent
11 process so that the immediate memory recall was at the 25th
12 percentile.

13 Yeah, so that is a significant finding. Also, the
14 overall memory scores were significantly lower than the --
15 than a global measure of conceptual intelligence. So that's
16 another way of saying like the cognitive efficiency, the
17 processing speed of that individual, is very limited and it
18 can impose a bottleneck on their processing speed, even though
19 they have a high level of intelligence.

20 Q. And on PX126 is your report on the results of the
21 Woodcock-Johnson Test of Cognitive Abilities?

22 A. Yeah.

23 Q. On timed measures on that Woodcock-Johnson, how did
24 Mr. Berger perform?

25 A. Consistently low.

1 Q. Can you give an example?

2 THE COURT: Excuse me, counsel. Can I interrupt you?

3 MR. WEINER: Yes.

4 THE COURT: I'm still trying to understand the
5 Wechsler Memory Scale. Can you just repeat the last thing? I
6 don't --

7 THE WITNESS: If you look at this paragraph down
8 here, this part down on the bottom.

9 THE COURT: Okay.

10 THE WITNESS: And it says WAIS-IV GAI, that stands
11 for general ability index. So what we do is we take your test
12 scores from the verbal conceptual tests and from the visual
13 spatial logical tests, so anything conceptual, we average that
14 together and try to get a ballpark of your conceptual
15 intelligence, and then we compare that to the efficiency of
16 your memory processing.

17 And so the idea being that kind of expecting those to
18 line up ideally, and the degree to which they don't line up
19 would reflect potentially like a limitation that could be
20 imposed by your attention focus, or your working memory, or
21 just your cognitive efficiency. So you have a lot of
22 knowledge and a lot of thinking ability, but there are these
23 factors, like how much you can hold in your mind at one time,
24 or how consistently you register multistep instructions, or,
25 you know, so there's like an inefficiency at that level that

1 can put a barrier there to make it harder for you to kind of
2 get your smartness out, and it would be related to memory.
3 And the relevance to attention is that attention is kind of a
4 gateway to memory, so if you're not focusing, it interferes
5 with memory.

6 THE COURT: So your takeaway from these test scores,
7 the memory scale, is that this gave you some information about
8 his ability to attend and focus and --

9 THE WITNESS: And learn and retain. And so where it
10 says difference, and that column, a difference would be -- a
11 standard deviation would be 15 points. So these are very
12 large differences. And when it says base rate, it says, well,
13 this is the percentage of the population that would show a
14 difference that size, because maybe I have a difference too,
15 or maybe you have a difference, but when do we say this is
16 really an impairment, or this is interfering with how I go
17 about doing things, compared to how it could be a problem for
18 everybody. And so very few people are as affected by this
19 factor.

20 THE COURT: Thank you.

21 BY MR. WEINER:

22 Q. The Woodcock-Johnson, that's on page 126, were there
23 measures that were administered?

24 A. Yeah, in the little symbol, the little dagger symbol,
25 that means that it was a time-limited test, just so people can

1 look at it and see.

2 Q. So on the time-limited test, how did Mr. Berger perform?

3 A. He tended to perform in a lower level.

4 Q. Did he perform below average?

5 A. Not for everything, but for most things, yes, including
6 things that are specifically designed to measure processing
7 speed that are not necessarily based on this kind of symbol
8 copying and, you know, symbol processing. They're different
9 kinds of materials, like pictured objects, and --

10 Q. So on the processing speed cluster --

11 A. Yes.

12 Q. -- his performance was at the two percentile?

13 A. Uh-huh. Right.

14 Q. What relevance does that have in terms of reading or
15 taking a test, or anything associated with the major life
16 activities that Mr. Berger needs to perform on the USMLE?

17 A. The tests in that grouping provide measures of thinking
18 efficiency with respect to time. And so that would relate to
19 reading in terms of -- like with rapid picture naming. Like
20 even if I'm not looking at the spelled version of a word, I'm
21 looking at its picture, like a teacup or something, how
22 quickly do I pull up the name of that item. And decision
23 speed has to do with comparison, so again, it's like a
24 relatively automatic type of retrieval, and then a comparison,
25 mental comparison process at a very basic level. So these

1 materials aren't hard, they're easy, but we're just looking to
2 see when we give you these simple things to do.

3 Q. How about the cognitive fluency cluster. What's your
4 takeaway on how that impacts Mr. Berger?

5 A. Very similar, in the sense that what it is, these are
6 measures, again, of like retrieval, like looking up in your
7 mind to pull up a word, or to pull up -- for example, they can
8 be diagnostic of learning and attention disorders, because
9 people that have those disorders also have slower processing
10 speed for this kind of access.

11 So for example, retrieval fluency, I say okay, quick,
12 you've got one minute to name as many kinds of tree as you can
13 think of. And so, you know, they're simple tasks, but we're
14 comparing to most other people.

15 Q. And on this assessment on the verbal comprehension, is
16 that a timed assessment?

17 A. You mean under verbal ability?

18 Q. Verbal ability cluster.

19 A. No, that is not. So that would be conceptual without a
20 time limit.

21 Q. And he scored in the 88th percentile on that?

22 A. Uh-huh. Uh-huh. And again, that has to do with specific
23 fact and word retrieval.

24 Q. The Woodcock-Johnson Test of Achievement?

25 A. Yeah.

1 Q. That's on PX127. Is that a test you administered?

2 A. Yes.

3 Q. And what does that test assess?

4 A. That assesses various component activities related to
5 reading, writing, and math, and also the performance of
6 different types of reading, writing, and math.

7 Q. And assessing one's reading, do they have both timed and
8 un-timed measures on the Woodcock-Johnson?

9 A. Yes.

10 Q. Can you discuss the results of the un-timed measures?
11 How did Mr. Berger perform?

12 A. The un-timed reading comprehension is at the 91st
13 percentile. And I don't recall Dr. Smith's scores from the
14 past, but I am sure it's, you know, close, although I would
15 say that his performance tends to be uneven but it's still a
16 very strong score. So if he has unlimited time to respond to
17 a comprehension item, then he scores very high.

18 Q. And on the reading fluency, is that a timed measure?

19 A. Yes, it is.

20 Q. Can you explain how that test is administered?

21 A. It is a test where you have a set number of minutes, and
22 then you read sentences, and then you mark them as true or
23 false.

24 Q. And are these complex sentences?

25 A. No, they're first or second grade level.

1 Q. All right. And how much time is one given for this
2 assessment?

3 A. Three minutes.

4 Q. How did Mr. Berger perform?

5 A. Around the fifth percentile.

6 Q. And is this something you actually observed?

7 A. Yes.

8 Q. Did you administer any other timed assessment of silent
9 reading?

10 A. Yes. The SATA, the Scholastic Ability Test For Adults,
11 Reading Comprehension.

12 Q. And that's located on PX127?

13 A. Yes. Right under "reading fluency."

14 Q. And how is that normed?

15 A. It's age basis for adults.

16 Q. How did Mr. Berger perform on that?

17 A. Consistently, fifth percentile.

18 Q. Can you describe this data? How is it administered?

19 A. It's another test where you read a passage, and then you
20 answer questions, and the passage remains displayed.

21 Q. Did you make any assessments of Mr. Berger's attention?

22 A. Yes.

23 Q. And what were they?

24 A. Some of the scores from the previous Woodcock cognitive
25 we'd already talked about, like the processing speed and

1 cognitive efficiency, the measure of -- on this page, on
2 PX127, understanding directions is at the 51st percentile.
3 While that's not below average, it's below the expected level
4 for someone with his verbal intelligence. What that is is
5 listening to multistep instructions, and then you're looking
6 at a pictured scene, and the instructions are to point to a
7 series of things in the picture. The processing speed was
8 difficult, and I suspect maybe sometimes the language
9 component.

10 So there was also very inconsistent performance, and it
11 looked to me like attention was fading in and out, where if a
12 person reaches a limit of language complexity they can't
13 understand beyond, they get the items correct until they reach
14 a certain difficulty level, and then they're tapped out.

15 Q. Did you administer any behavior rating scales regarding
16 Mr. Berger's attention?

17 A. The BRIEF, which is Behavior Rating Inventory of
18 Executive Functioning. Executive percentile is an aspect of
19 attention percentile. Inattentive features have more to do
20 like things with planning, organization, initiation, getting
21 started on things, et cetera.

22 Q. And why do you administer the behavior rating scales?

23 A. For self-report, to assess are any of these areas
24 remarkably difficult for someone compared to most other
25 people.

1 Q. And you also provided these behavior rating scales to a
2 secondary source?

3 A. In this case, I don't know that I did that. I don't
4 think I did for the brief.

5 Q. All right. And what diagnosis did you identify in your
6 report?

7 A. Oh, I forgot -- the Brown ADD scales were given, and I
8 forgot that there was a collateral respondent, so that's on
9 129. So the self-report, the higher the score, the greater
10 the frequency or intensity of problems, symptoms of ADD in
11 terms of functional impact in major life activities.

12 And they're broken out into categories of difficulty.
13 Activation is getting organized, getting started. Attention
14 is sustaining your focus, concentration. Effort really
15 relates to fatigue and the experience of fatigue. Affect,
16 getting discouraged or frustrated or annoyed by having
17 additional learning issues. And memory is the impact on
18 memory that would be secondary to attention-related problems.
19 And so yeah, so this is his professor.

20 Q. And what diagnosis did you identify, or diagnoses? And
21 that would be at PX106.

22 A. Reading disorder, disorder of written expression, and
23 Attention Deficit Hyperactivity Disorder, predominantly
24 inattentive.

25 Q. And did you also perform a differential diagnosis to rule

1 out that this might not be as a result of any other condition?

2 A. Yes, I did.

3 Q. And are your impressions summarized in your report at
4 PX99 and PX100?

5 A. Yes.

6 Q. And did you make your diagnosis consistent with the
7 criteria set forth in the DSM-IV?

8 A. Yes.

9 Q. And did you detail that on pages PX107 through 115?

10 A. Yes.

11 Q. What were your recommendations regarding accommodations
12 in 2013?

13 A. At that time, I recommended that a reader or a recorded
14 version of a test be made available. Sometimes a recording is
15 made available so the person can play a particular test item
16 if they want to hear it. Extended time to complete the test.
17 At this point, I recommended 50 percent. And extra rest
18 breaks, and multiple day administration, and a quiet room.

19 Q. And that was for this Step 1?

20 A. Yes.

21 Q. Did you have an occasion to evaluate Mr. Berger for a
22 third time?

23 A. Yes.

24 Q. And that was in 2017?

25 A. Yes.

1 Q. And I believe that's at Exhibit 8.

2 Is your evaluation in 2017 that Exhibit 8?

3 A. Yes.

4 Q. Was this evaluation performed in connection with the
5 Step 2 CK?

6 A. Yes.

7 Q. What assessments did you administer?

8 A. The Woodcock-Johnson Test of Achievement, and this is the
9 Fourth Edition.

10 Q. Were the results consistent with prior results?

11 A. They were a little different. The construction of the
12 test does change in third and fourth. I've had different --
13 some more scored differences. The tests are very carefully
14 constructed to provide the same scores as the previous version
15 for the average person, but people who have learning
16 disabilities are more sensitive to the format of the task and
17 the material, and so they're more likely to be inconsistent
18 than the average person. So I have found a little variability
19 in that regard. There's also new norms, updated norms.

20 Q. And when you conducted this evaluation, did you make an
21 assessment of Mr. Berger's motivation and vigilance?

22 A. Yes.

23 Q. And what have you concluded?

24 A. He was motivated, business like, on task and, you know,
25 wanting to be successful.

1 Q. And what were your conclusions based on after doing that
2 evaluation?

3 A. Basically, it was an update, updated measure. And the
4 scores are very similar, so the findings are very similar, but
5 I will say also that not only did the achievement test get a
6 revision, but the diagnostic system was revised. So the DSM-V
7 is now in use instead of the DSM-IV, and it has different
8 categories in terms of learning disorder and so on.

9 Q. And did you administer timed reading assessments?

10 A. Yes.

11 Q. And what timed reading assessment did you administer?

12 A. Some of the tests of the Woodcock IV under reading are
13 either time limited or they're functionally time limited in
14 the sense that you can only read the material one time.

15 Q. And what were the results of the Woodcock-Johnson IV?

16 A. Continues to show very low scores for time limited
17 reading comprehension and other academic areas, and limited
18 ability, or much less automatic and accurate in word
19 identification and phonological decoding.

20 Q. There's a subtest for oral reading fluency. Is that
21 something --

22 THE COURT: Can you tell me what page you're on?

23 THE WITNESS: 211.

24 MR. WEINER: Oh, I'm sorry, Your Honor. PX211 is the
25 result.

1 THE COURT: Thank you.

2 Q. The oral reading fluency, is that something that you
3 would administer yourself?

4 A. Yes.

5 Q. Are you able to take observations of his oral reading
6 fluency?

7 A. Yes. It's very much like the Gray Oral Reading Test, in
8 terms of someone reads a passage out loud to me, and I'm
9 marking the accuracy of their reading. So I'm not recording
10 how fast they're reading or their time, but I am marking
11 accuracy.

12 Q. And what did you note about his oral reading fluency?

13 A. Same as before. He has a high rate of word
14 identification errors, including omissions, and substituting
15 words that look similar but are not, don't make sense in the
16 context, and -- yep.

17 Q. And the sentence reading fluency, is that silent?

18 A. Yes.

19 Q. And so in the sentence reading fluency subtest, how did
20 he score?

21 A. Very low.

22 Q. And in the oral reading fluency, how did he score?

23 A. The which?

24 Q. The oral reading.

25 A. Both of those are like at the first percentile.

1 Q. Okay. That's below average?

2 A. Yes.

3 Q. And how about his reading rate, where did that fall?

4 A. By different measures of reading rate, again, around that
5 first percentile, pretty low.

6 Q. Did you render a diagnosis?

7 A. Yes.

8 Q. Is your diagnosis consistent with your prior diagnoses?

9 A. Yes.

10 Q. The measures that you've administered over the course of
11 your three evaluations, are these all recognized or robust
12 measures that are performed in the area of psychology?

13 A. Yes, they are typical.

14 Q. And were your diagnoses for the 2017 evaluation
15 consistent with the DSM?

16 A. I'm still finding it, but yeah, they were conceptually
17 consistent but we just have different categories.

18 THE COURT: It's on 199.

19 THE WITNESS: Thank you.

20 THE COURT: You're welcome.

21 A. Right. So now we say specific learning disorder, and
22 then within that, then we break out by category that it
23 involves, you know, various specific academic areas.

24 Q. And are these diagnoses made consistent with the DSM?

25 A. Yes.

1 Q. Did you make recommendations regarding accommodations for
2 this Step 2 CK?

3 A. Yes.

4 Q. And what were your recommendations?

5 THE COURT: Can I ask a question? Back in the
6 diagnosis page, on 199, and maybe this is just a result of the
7 amendments to the DSM-V, there's an etiology, severity, and
8 prognosis?

9 THE WITNESS: Uh-huh. Well, you know, there really
10 was a major revamp, and so in the past, we called it a
11 five-axis diagnosis, and we had various information on there.
12 And so also like over time, in my own report writing style,
13 you know, I've evolved conventions. And so in more later
14 years, I started putting that in the diagnosis because it
15 really wasn't -- you know, it wasn't captured in that five
16 axis any more, but also it's a relevant question you do need
17 to address, for every diagnosis you're giving, what is the
18 etiology, you know. Did they get a head injury last week, you
19 know, do we know that it was due to some factor or not. And
20 that becomes relevant for a lot of purposes, because then we
21 know if it's a short-term or long-term kind of problem.

22 In terms of severity too, sometimes it's a little hard to
23 take a diagnosis like a learning disability and force it to
24 fit into a diagnostic coding system that's really invented by
25 MDs, you know; for depression, sometimes the way they have

1 these diagnostic things laid out makes a lot more sense, but
2 for us, we need a little more information.

3 And the same with prognosis. So any good evaluation
4 report that concerns this kind of disability needs to make a
5 statement about the severity of the impact, the prognosis, and
6 do you know the etiology. That's just me adding.

7 THE COURT: Thank you.

8 BY MR. WEINER:

9 Q. Going back to the recommendations you made for the
10 accommodations on the Step 2, what were they?

11 A. Additional testing time. This time I'm recommending a
12 hundred percent. I just went back to that recommendation,
13 especially in my concern for Step 2 because it is a more
14 reading-intensive exam. And I know that because I have helped
15 a lot of people study for that exam, and worked with a lot of
16 people who were struggling with the reading aspect of that
17 exam. So I'm very familiar with it. And I had concern about
18 the impact of that.

19 And a recorded version. Again, because his reading
20 accuracy is so low and his comprehension is inconsistent, that
21 could really do damage to you in that type of an exam. If
22 you're not reading accurately, you can't answer the question
23 using the knowledge that you have. And I thought hearing it
24 would be important.

25 Extra rest breaks. If you're going to have a six-hour

1 exam, let's have some rest breaks. Usually, that's provided.
2 If you're going to give extended time, you have extra rest
3 breaks. I would recommend two-day administration, because
4 otherwise it would be impossible to have, you know, double
5 time on an exam of this length. He can't take a test for
6 16 hours.

7 A private distraction-limited room. Ever since very
8 early childhood, he's been very vulnerable to distraction and
9 has a hard time sustaining his focus, and that creates
10 problems. You have to use a lot more mental energy and effort
11 to be able to read and comprehend, and if there are noises,
12 then you're using mental effort to screen those out.

13 And if there's a clinical skills component to future
14 exams, where he has to read a patient chart or he has to write
15 a more extensive note, then I would recommend extra time for
16 that.

17 Q. Did you review Mr. Berger's MCAT scores in connection
18 with your evaluation?

19 A. Yes.

20 Q. Did you also review his score report for the USMLE
21 Step 1?

22 A. Yes.

23 Q. Are those scores inconsistent with his reading fluency
24 scores or his other timed reading scores?

25 A. I'm sorry. Can you rephrase that?

1 Q. Are his MCAT scores inconsistent with the type of scores
2 that he received on his timed reading scores that you
3 administered?

4 A. You mean are they higher?

5 Q. Yes.

6 A. Yes.

7 Q. Can you explain how that could possibly happen?

8 A. Well, there are different kinds of reading, and one way
9 that people can significantly increase their reading rate is
10 if they know ahead of time what the material is going to be,
11 and they can practice and rehearse, they know what the format
12 of the question is, so you have a good opportunity to really
13 familiarize yourself with more context for what to expect.

14 And in addition, he's very good at coming up with
15 compensatory strategies to speed up his reading for this kind
16 of test, like the whole idea of not reading the content but
17 just reading the responses is, you know, so he's very
18 strategic in that way.

19 And those kinds of strategies just really don't work for
20 something I give you that's novel, even if it's really simple
21 reading, because you haven't just spent the last six months
22 trying to figure out a way to break through.

23 Q. Have you had other patients where you've seen low reading
24 fluency scores but MCAT scores within the average range?

25 A. Yes.

1 Q. Is this something that you've seen on several occasions?

2 A. Yes, because of the strategy.

3 Q. Is the MCAT a diagnostic test used in making diagnoses of
4 reading disabilities?

5 A. Not officially.

6 Q. Okay. Is utilizing the MCAT to rule out a diagnosis
7 based on the DSM an appropriate thing to do?

8 A. I would not do that.

9 MR. WEINER: I'm done, Your Honor.

10 THE COURT: You want to get started for 20 minutes?

11 MR. BURGOYNE: I could at least ask some preliminary
12 questions I had on her CV, Your Honor. That will get a few
13 questions out of the way.

14 THE COURT: All right. Let's do that, then. Thank
15 you.

16 CROSS-EXAMINATION

17 BY MR. BURGOYNE:

18 Q. Just to remind you, I think it's Exhibit 63, your CV. Do
19 you have that page, or that exhibit?

20 A. Yes.

21 Q. Just two sections here I want to ask you about. One is
22 on page 6. This is where you were discussing your work doing
23 evaluations and preparing reports to support accommodation
24 requests?

25 A. Uh-huh.

1 Q. And you reference several exams here. About how many of
2 those do you do in a given year?

3 A. Did you say page --

4 Q. Page 6. Numbered page 6.

5 A. Oh, oh, oh. Hang on, please. Yes. Got it.

6 Q. And you see the second paragraph there?

7 A. Uh-huh. How many?

8 Q. Yeah. About how many of those do you do?

9 A. Per year, per --

10 Q. Well, just in the past year, how many would you say
11 you've done of individuals seeking compensation on tests?

12 A. I would estimate maybe five or six, because I limit those
13 because they're so lengthy and detailed. They're very time
14 intensive.

15 Q. I believe you described your work on Mr. Berger's report
16 "it was a complicated case." What was complicated about it?

17 A. I don't know if I said that.

18 Q. Do you think it was a complicated --

19 A. Complicated how? I mean --

20 Q. Well, I was just following up on your testimony. I can't
21 tell you what you meant by it.

22 A. I guess I would say that it was -- I'm trying to think if
23 I would think of it as complicated. I felt that
24 diagnostically it was not complicated, but what was
25 complicated is that he had a large chunk of time where he did

1 not have individual evaluations, and in the private school
2 system, they -- back at that time especially -- did not keep
3 written records. And so it can be complicated to round up
4 documentation in that regard.

5 It's also hard, you know, when I came in to it in 2010,
6 my original goal was to just be helpful by looking at the
7 evaluations that had been done, in looking at the denial
8 letters and interpreting that for people, because it has --
9 sometimes people don't know what they don't know, if they
10 don't know to go to a website and look up the documentation
11 requirements, and so it's always complicated if you're walking
12 into a situation like that and going beyond just saying here's
13 what I think would be -- you know, this is what I think the
14 NBME is trying to tell you they need. If you take it beyond
15 that, it does become complicated.

16 Q. Did you have any reason to think that Mr. Berger wasn't
17 familiar with the documentation requirements for the NBME,
18 that he hadn't gone to the website and retrieved those?

19 A. I don't remember that far back, but I do remember that
20 neither the disability service office, nor Dr. Smith, and I
21 don't think the family was as dialed in on that as they might
22 have been. He might have been aware for the MCAT; but, like I
23 say, you know, oftentimes, you know, people look that up and
24 they -- like for Dr. Smith, his thinking was this is so
25 obvious, I really don't need to do much other than kind of

1 like an update, you know. And if he would have -- so I can't
2 say whether he looked up the requirements and then decided
3 they didn't apply, or, you know, what, but --

4 Q. And --

5 A. -- a lot of people just don't even know they're there,
6 you know.

7 Q. Take a look at page 11 of your CV.

8 Looks like, for at least two years, you served as a
9 medical expert for the Social Security Administration --

10 A. Yes.

11 Q. -- Office of Hearings and Appeals?

12 A. Right.

13 Q. And can you tell us what that work involved?

14 A. I would advise the judge in an appeal hearing. So they
15 would give me the request for disability, the file for that
16 person, meaning the medical record and all the supporting
17 documents, and I would review the assessment that had been
18 done to determine if there was evidence, in my opinion, to
19 show that there's a disability based on the criteria for
20 Social Security Disability.

21 Q. Okay.

22 A. Under whatever category.

23 Q. And what type of impairments did you provide those types
24 of recommendations and opinions?

25 A. The psychiatric code.

1 Q. And by that sort of DSM-IV are the same type of
2 impairments that we're talking about here today?

3 A. Right. And so for both children and adults, and there
4 are different disorders qualifying under those, and -- but it
5 would be things like depression, bipolar disorder, et cetera.

6 Q. And did any of those reviews include any diagnoses of
7 ADHD or learning issues that either a child or adult had?

8 A. Yes.

9 Q. And when you did those, I believe you said you did those
10 based on a paper-based record?

11 A. Right.

12 Q. And you didn't personally evaluate the candidate?

13 A. No. I evaluated the data that resulted from the
14 evaluation.

15 Q. Okay. And then at the end of that, you felt you were in
16 a position to make a recommendation to the judge as to whether
17 or not this individual met the applicable standard for being
18 disabled?

19 A. Right. And there's specific criteria.

20 MR. BURGOYNE: No further questions right now, Your
21 Honor.

22 THE COURT: Okay. Let's talk about tomorrow.
23 Assuming everybody is in town staying around. I know we've
24 got two -- how many witnesses are you calling besides
25 Dr. Beach? Do you have anybody else?

1 MR. WEINER: No one else, Your Honor.

2 THE COURT: Mr. Burgoyne, do you have two?

3 MR. BURGOYNE: Your Honor, I have three. One of the
4 them, though, is Cathy Farmer, whose declaration we've
5 provided, that just walks through the process for reviewing
6 the accommodation request. Subject to what he wants to do, I
7 could probably expedite that if we could just rely some on her
8 declaration instead of having her go through that whole
9 testimony again.

10 THE COURT: Any objection?

11 MR. WEINER: No objection, Your Honor.

12 MR. BURGOYNE: Okay. And then I'll try to streamline
13 the other two, because everybody would like to finish
14 tomorrow.

15 THE COURT: Okay. I'm wondering if we started at
16 8:30?

17 MR. BURGOYNE: Great.

18 MR. WEINER: Fine.

19 THE COURT: Sue?

20 THE COURT REPORTER: Yes. That's fine, Judge.

21 THE COURT: And that works for, you Dr. Beach?

22 THE WITNESS: Fine.

23 THE COURT: Thank you.

24 (Proceedings adjourned at 5:49 p.m.)

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C E R T I F I C A T E

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I, M. Sue Lopreato, the undersigned, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ M. Sue Lopreato
M. Sue Lopreato
Official Court Reporter

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